Supreme Court, U.S.
FILED

061423 APR 20 2007

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

RES-CARE, INCORPORATED, SUCCESSOR BY MERGER TO RES-CARE HEALTH SERVICES, INCORPORATED, AND COMMUNITY ALTERNATIVES INDIANA, INCORPORATED,
Petitioners,

v.

OMEGA HEALTHCARE INVESTORS, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case raises a significant question regarding the implementation of the "integration mandate" of the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* (2005), the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (2005), and *Olmstead v. L.C.*, 527 U.S. 581 (1999), for people with mental retardation, developmental disabilities and other institutionalized people:

> Whether the established public policy of the integration mandate requires the operator of an institutional care facility to cooperate with state and federal Medicaid officials to help people with disabilities move out of the facility and into less restrictive settings such as integrated community living, *in spite of contractual restrictions that arguably prohibit these actions*, when the following three *Olmstead* factors have been established:
>
> 1. "the state's treatment professionals have determined that community placement is appropriate;"
>
> 2. "the transfer from institutional care to a less restrictive setting is not opposed by the affected individual[s];" and
>
> 3. the state has the resources, and "placement can be reasonably accommodated."

PARTIES TO THE PROCEEDINGS

Petitioners

Res-Care, Incorporated, successor by merger to Res-Care Health Services, Incorporated, and Community Alternatives Indiana, Incorporated, collectively "Res-Care."

FMR Corporation, Bank of America Corporation and its affiliates, and affiliates of Onex Corporation own 10% or more of Res-Care's stock.

Respondent

Omega Healthcare Investors, Incorporated.

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The opinion of the United States Court of Appeals for the Seventh Circuit reversing summary judgment entered in favor of Res-Care and granting summary judgment in favor of Omega is reported at 475 F.3d 853 (7th Cir. 2007). A copy of the opinion is included at Appendix A at 1a-21a. The opinion of the United States District Court for the Southern District of Indiana granting summary judgment in favor of Res-Care is unreported but is included at Appendix B at 22a-31a. The opinion of the United States District Court for the Southern District of Indiana denying Omega's motion to reconsider entry of summary judgment in favor of Res-Care is unreported but is included at Appendix C at 32a-34a.

JURISDICTION

The opinion of the court of appeals was issued on January 22, 2007 (App. A. at 1a). This Petition for Writ of Certiorari is filed within 90 days after the court of appeals issued its ruling. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (2005).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. § 794(a) (2005) (Rehabilitation Act)

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted

by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

28 C.F.R. § 41.51(d) (2006)

Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

42 U.S.C. § 12132 (2005)
(Americans with Disabilities Act)

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.130(d) (2006)

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

STATEMENT OF THE CASE

This dispute arises from evolving public policy and the "integration mandate" which provides that when people with disabilities want to live in the community, when their treatment professionals determine that community living is appropriate, and when the state has resources available, *integration into the community is required. See* the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (2005) (the "ADA"); the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.* (2005); *Olmstead v. L.C.*, 527 U.S. 581 (1999). The basis for federal jurisdiction in the district court was 28 U.S.C. § 1332 (2005).

Omega Healthcare Investors, Inc. ("Omega") has claimed that Res-Care breached a contract by improperly diverting what Omega has called the "operating assets" of its business – otherwise known as the *people* with disabilities who lived in a large Intermediate Care Facility for the Mentally Retarded ("ICF/MR") operated by Res-Care in Lexington, Kentucky known as "Excepticon." About 180 people with disabilities lived there until late 1999 when all but a small number of them moved into less restrictive housing arrangements. All of the 180 people received funding for their housing services from the federal/state Medicaid program.

Instead of breaching contractual duties and facing liability for millions of dollars in damages, as the Seventh Circuit has held, Res-Care believes it was required by the integration mandate to provide the Excepticon residents with the option of moving into the community. When all of the residents or their guardians expressed a desire to move, Res-Care was also required to assist these individuals in moving out of Excepticon into community settings that were the "most integrated setting appropriate" to receive housing services.

See 29 U.S.C. § 794(a) (2005); 42 U.S.C. § 12132 (2005); 28 C.F.R. § 41.51(d) (2006); 28 C.F.R. § 35.130(d) (2006).

A. The Public Policy of the Integration Mandate.

Res-Care's actions were supported by the prohibitions on discrimination based on disability contained in the Rehabilitation Act and the ADA and the regulations implementing those statutes. The Rehabilitation Act regulations, for example, require that "any program or activity that receives or benefits from federal financial assistance ... shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(a), (d) (2006).

The Attorney General issued specific regulations to implement Title II of the ADA, including one called the "integration regulation" modeled on the Rehabilitation Act regulation. This regulation specifically mandates that covered services must be provided "in *the most integrated setting appropriate* to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2006) (emphasis added).

The preamble to the Title II regulations defines the regulation's requirement of "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. A, subpart B (2006). The Title II preamble further states that "these provisions are intended to prohibit exclusion and segregation of individuals with disabilities ... . Integration is fundamental to the purposes of the [ADA]. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." *Id.*

This public policy was confirmed in *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999), this Court's seminal decision which upheld the integration mandate and ruled that under certain circumstances (present in this litigation), the mandate actually requires integration in community settings instead of institutions:

> The proscription of discrimination may *require* placement of persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. (emphasis added).

The integration mandate requires that, regardless of any lease terms between Res-Care and Omega, residents of the Excepticon facility were entitled to leave when, as in this case, they wanted to move, their treating professionals determined it was appropriate and resources were available. Kentucky's Department of Public Advocacy, Protection and Advocacy Division ("Protection & Advocacy") confirmed these facts in its amicus submission, App. E at 52a, and the Commonwealth of Kentucky's Cabinet for Health Services confirmed its efforts to comply with the integration mandate and provide community-based services. App. F at 62-63a.

Res-Care has not argued that the integration mandate requires the closure of all institutions or that continued operation of institutions would be "illegal." Omega was never

able to cite to such a claim by Res-Care, and the Seventh Circuit could not either. Still, that was a fallacy relied upon by both Omega and the court of appeals. *See* App. A at 19-20a. Res-Care's position has uniformly been that private contracts cannot be interpreted to override federal and state public policy, and prevent ICF/MR operators from helping people with disabilities move into the community.

In accordance with the integration mandate, Res-Care began working with Kentucky's Cabinet for Health Services in mid-1998 to convert its services for most of the clients to community-based services. This is what Res-Care's clients and their legal guardians wanted (and what Congress and the Kentucky General Assembly wanted too). But the Health Care Financing Administration (now Centers for Medicare and Medicaid Services) required Res-Care to close its ICF/MR operations before Medicaid would provide funding for Res-Care's clients in the community. So Res-Care closed its institutional operations at Excepticon, withdrew from the Medicaid program for the Excepticon ICF/MR, and left Omega with what was previously leased to Res-Care – a building. However, because the building could not be used as an ICF/MR, Omega could not lease it to a new operator.

B. The Claims and Rulings Below.

Omega argued below that Res-Care was contractually prohibited from taking steps to decertify or close Excepticon and helping integrate its residents into less restrictive settings. In response, Res-Care explained that its efforts to work with state and federal Medicaid officials to help the residents move into the community were required by the integration mandate.

Res-Care's position was supported by amicus briefs filed by the Kentucky Protection & Advocacy Division (App. E at

49a) and the Commonwealth of Kentucky's Cabinet for Health Services (App. F at 60a). After numerous residents of Excepticon appeared at a district court hearing in September 1999 to testify to their desire to leave Excepticon and move into group homes and other community arrangements, Omega withdrew its initial request for injunctive relief. The parties negotiated an Agreed Order that was entered by the district court on October 26, 1999, which specifically provided that Excepticon residents "who request to move from such facility may do so." App. G at 74a. After an agreed holdover period, Res-Care in fact coordinated moves for the Excepticon residents into the community, and *Medicaid* required the decertification of Res-Care's authority to operate Excepticon as an ICF/MR.

Res-Care subsequently sought summary judgment dismissing Omega's breach of contract claim based on the established public policy of the integration mandate and because Omega was seeking to enforce terms of the Management Agreement that had already expired as a matter of law. Omega, in turn, filed a cross-motion for summary judgment arguing that Res-Care's role in decertifying Excepticon constituted breach of contract as a matter of law.

On December 4, 2003, the district court granted summary judgment in favor of Res-Care and denied Omega's cross-motion. App. B at 22-31a. The district court held that no breach had occurred as a matter of law because Omega had only alleged a breach of the already-void Management Agreement, and thus "Omega has failed to identify any contractual obligations that existed as of the time [of the alleged breach]." App. B at 30a. The district court had previously ruled that Res-Care could assert its public policy affirmative defense and that the court could not dismiss that defense as a matter of law. Thus the court held that summary

judgment was not warranted for or against Res-Care on those grounds, believing the existence of the three factors identified in *Olmstead* should be resolved by the jury. App. B at 28a; App. D at 45a.

Omega sought reconsideration of summary judgment, arguing that it had actually alleged that Res-Care breached the Lease, not just the expired Management Agreement. The district court ruled that "it did not misapprehend or misunderstand the allegations of Count V as argued by Omega" and "[t]he Complaint clearly referred to the Management Agreement, not the Lease Agreement." App. C at 33a. Public policy was not an issue on reconsideration.

The court of appeals reversed the district court and held that Res-Care's actions breached several provisions of the parties' agreements, including:

- Lease ¶ 36, requiring the lessee to surrender the "Demised Premises" upon termination of the lease without any "default, cancellation or termination" that could bind the lessor or its assigns; to use its "best efforts" to persuade its employees to become employees of the lessor or its assigns; and to allow the lessor to use its Medicaid provider number so Medicaid could continue to be billed during the transition period, App. H at 118-122a;

- Lease ¶ 25, stating that the lease would be breached if the Management Agreement were terminated or if any default occurred under the Management Agreement, App. H at 113a; and,

- Management Agreement §§ II (d) and (h) (through its incorporation by Lease ¶ 23), requiring the

> Manager to "maintain and operate the facility in compliance with the standards for state licensure ... sufficient to maintain a license as an ICF/MR" and "not do or permit to be done any act or thing which ... is incompatible with its operation as an ICF/MR." App. H at 109a; App. I at 131a, 132a.

As a practical matter, it would have been impossible for any lessee to comply with both the integration mandate and these contractual provisions.

This impossibility is precisely what created the conflict between Res-Care and Omega, and it is what creates an insurmountable obstacle for people with disabilities who want to move into the community. Without expressly articulating it, the court of appeals weighed the "freedom to contract" more heavily than the broadly-established federal and state public policy that requires community-based services in circumstances where people with disabilities want to move, their treating professionals determine integration is appropriate, and state resources are available. The contract terms identified by the court of appeals cannot be satisfied if an ICF/MR operator helps its residents move into the community.

Thus, the Seventh Circuit's reinstatement of Omega's breach of contract claims – and actual award of summary judgment to Omega without any further factual findings by the trial court or jury – was significantly more troublesome than simply being clear error. The court of appeals decided an important question of federal law in conflict with *Olmstead* and in a way that will inevitably chill future efforts to integrate people with mental retardation into the community. ICF/MR operators like Res-Care must be allowed to work with state and federal Medicaid officials to help people with

mental retardation and developmental disabilities move out of institutional facilities and into less restrictive settings, despite contract terms that building owners like Omega may seek to invoke to retain their "operating assets."

C. The Parties and the Contracts.

Res-Care is a publicly traded company which provides services for people with mental retardation, developmental disabilities, and disabilities caused by acquired brain injury, among other services. Res-Care was founded in 1974 and is now the nation's largest provider of residential, training, educational and support services to more than 32,000 people in 37 states, the District of Columbia, Puerto Rico and Canada. The people served at Excepticon received residential, medical, and other services from Res-Care through the federal/state Medicaid program, 42 U.S.C. § 1396, *et seq.* (2005). As a Medicaid provider, Res-Care contractually agreed to accept payment amounts established by Kentucky for its services, in exchange for complying with numerous regulatory requirements relating to client rights, quality of services, physical plant, and administration.

Res-Care began offering services through community-based group homes in 1983. In 1992, Res-Care also began offering residential services where people with disabilities could live on their own with outside support as needed (through day programs, supported employment services, or transportation services, for example). Pursuant to the "integration mandate," Res-Care now provides most of its services in apartments, homes and other community-based settings, and frequently the owners or lessees are the people with disabilities themselves.

Omega is a publicly traded Real Estate Investment Trust ("REIT"), which means it is in the federally-regulated business of owning buildings for investment. As a REIT, Omega was simply the owner of real property in Lexington, Kentucky and it did not operate the ICF/MR or provide any services. Instead, Omega's lessees ran their own concerns, *pursuant to their own state licenses to do so*. Omega is solely in the business of owning buildings and collecting rent.

The Lease for Excepticon (a document separate from the Management Agreement) was entered into between Omega's predecessor and Robert E. Petrie. App. H at 78a. Until 1998, Res-Care simply managed Excepticon for Petrie and was not a party to the separate Lease. *Compare* App. H at 78a and App. I at 129a. In 1998, with Omega's full knowledge and consent, Petrie assigned the operation of the ICF/MR to Res-Care, and Res-Care became the Medicaid-certified licensee, owner of the Excepticon concern, and lessee of the property instead of its manager. Res-Care applied for and obtained its own Medicaid license, entered into its own Medicaid Provider Agreement with Kentucky, and operated the Excepticon ICF/MR on Omega's property.

After the assignment, no separate manager existed so the Management Agreement expired as a matter of law. The district court held that the Management Agreement was "null and void" under Kentucky law. App. B at 29a. The court of appeals agreed that the Management Agreement was void due to the assignment but still held Res-Care to its terms. App. A at 8a, 12a.

Omega's landlord business worked best during the era before the integration mandate, when people with mental retardation were housed exclusively in institutional settings. Omega's Lease is a relic of that era. *See, e.g.*, App. F at 64a

("Kentucky's commitment to community-based residential services has evolved significantly since 1989 when Res-Care's predecessor entered into the Excepticon lease with Omega's predecessor."). Now that public policy has evolved to promote community integration, the issue before this Court is whether landlords can enforce outdated contracts that conflict with the integration mandate.

REASONS FOR GRANTING THE WRIT

This Petition should be granted because the "integration mandate" will be significantly undercut, and public policy as established by the executive and legislative branches disregarded, if the Seventh Circuit's misapplication of *Olmstead* is not corrected. *Olmstead* is widely heralded as the *Brown v. Board of Education* for disability rights, but its significance will be dramatically undermined by decisions like the one below.

The Seventh Circuit's decision conflicts directly with the integration mandate and with this Court's decision in *Olmstead* by effectively eliminating the three-factor test for *requiring* community-based services. *Olmstead*, 527 U.S. at 587. The decision below will force people with disabilities who want to leave large institutions to stay in those facilities instead of promoting their integration into their communities. The court of appeals failed to recognize and defer to the legislative and executive establishment of the integration mandate, as well as to this Court's interpretation of the mandate.

A. The Seventh Circuit's Ruling Directly Conflicts with *Olmstead* and the Integration Mandate.

Unless the court of appeals is reversed, people with mental retardation and other disabilities will encounter further barriers to community integration and will inevitably suffer the consequences of being "warehoused," despite their wishes and despite the availability of community-based Medicaid services. This flatly contradicts the integration mandate. *Olmstead* requires that, regardless of any private contract terms between Res-Care and Omega, residents must be permitted to leave Excepticon when, as in this case, their treating professionals determine it is appropriate and resources are available.

Of course, because Omega is an owner of large buildings that house ICF/MRs and other long-term care facilities, "warehousing" is exactly what Omega needs to sustain its outdated business model. Owners of large institutional buildings like Omega have lost their occupants because of the integration mandate. In simple economic terms, there is no longer significant market demand for the residential services those institutions can supply. Corporate owners of those facilities have had to adjust to a disappointing business climate – just as buggy whip manufacturers had to adjust to the emergence of the automobile industry, and telephone booth manufacturers had to adjust to widespread use of cellular phones.

The crux of *Olmstead* was not simply that people with disabilities be given an abstract option of community placement, as the court of appeals incorrectly stated. App. A at 19a ("Res-Care overlooks the fact that *Olmstead* requires only that particular individuals be given the choice of community placement or institutional care."). *Olmstead*

requires that the "choice" be genuinely available. Providing a bona fide choice only happens with extended coordination among ICF/MR operators, treatment professionals and state and federal government officials. For example, the Commonwealth of Kentucky's Cabinet for Health Services described the coordination of efforts that resulted in the community living opportunity for the Excepticon residents as follows: "It has been extremely time-consuming and difficult for the Cabinet to arrange the federal approvals, the individual consultation and consents, and the intra-agency coordination required to meet the ADA mandate recognized by [*Olmstead*]." App. F at 71a.

In order to provide the genuine choice that the court of appeals ostensibly acknowledged to be required by the integration mandate, Res-Care *had* to undertake the specific actions that the court of appeals ultimately held breached the parties' contract. Res-Care *had* to cooperate with Kentucky's Cabinet for Health Services and Protection & Advocacy Division; Res-Care *had* to cooperate with its clients' treatment professionals; Res-Care *had* to cooperate with state and federal Medicaid officials; Res-Care *had* to agree to forfeit its Medicaid license; Res-Care *had* to agree to help the residents move into the community; and Res-Care *had* to accept Medicaid's requirement to decertify the ICF/MR. Without these actions, Res-Care could not have provided any bona fide choice to the residents of Excepticon. Therefore, choice was impossible without the actions that were deemed to breach Omega's contract.

Instead of focusing on whether choice was available in abstract terms, the court of appeals should have considered and applied the three-part test from *Olmstead*, which if satisfied, *requires* community placement. 527 U.S. at 587.

This test is easy to apply for the former residents of Excepticon:

(1) Kentucky's treatment professionals determined that community placement was appropriate;

(2) The transfer from institutional care to a less restrictive setting was not opposed by the residents, and in fact they requested it; and

(3) Kentucky had the resources to accommodate the placements because "Conversion Waivers" were available, under which Medicaid services could be provided in community-based settings instead of ICF/MRs.

See, e.g., App. E at 52a (Protection & Advocacy's description of these three factors and explaining why Kentucky decided to provide community-based services).

Similarly, the record before the court of appeals included testimony of Kentucky's former Medicaid Commissioner, Dennis Boyd, clarifying that the Excepticon residents who moved into the community were acting of their own free choice and did not want to stay in an ICF/MR. None were "evicted," as Omega argued, nor were they otherwise forced against their will to move into the community. *See* Appellate Record, Docket #199, Ex. 1, at p. 34. Accordingly, under *Olmstead* and the integration mandate, Res-Care and Kentucky were *required* to provide community-based services to the residents of Excepticon. At the very least, the court of appeals erred by granting summary judgment in favor of Omega without addressing the jury questions identified by the district court. *See* App. B at 28a; App. D at 45a.

Indeed, it appears that even the same court of appeals that issued the decision below recognizes that the interpretation given *Olmstead* in this case was misstated and misapplied. In the decision below, the court of appeals understated the integration mandate by stating that "*Olmstead* requires only that particular individuals be given the choice of community placement or institutional care." App. A. at 19a. However, 24 days later in *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007) (outside the 14-day deadline for Res-Care to petition for rehearing or rehearing *en banc*), the same jurist wrote for a different panel and properly recognized that "*Olmstead* established that it is a violation of the ADA to *force* developmentally disabled patients to reside in institutionalized settings when they are able to live more fully integrated into society at large and do not oppose doing so." (emphasis added) (citing *Olmstead*, 527 U.S. at 597-602). The court further commented that the *Olmstead* decision "left the exact route to implementing this integration mandate somewhat murky." *Ligas*, 478 F.3d at 773.

The court of appeals may be correct that implementation of the integration mandate is "somewhat murky," and perhaps that murkiness led to the dispute between Res-Care and Omega. Yet whatever murkiness may exist, that does not warrant an abandonment in this case of the requirement to provide community-based care in circumstances where people with disabilities want to live in the community, their treatment professionals determine that community living is appropriate, and the state has resources available. Had the court of appeals applied the *Ligas* analysis to the closure of Excepticon – i.e., "it is a violation of the ADA to force developmentally disabled patients to reside in institutionalized settings when they are able to live more fully integrated into society at large and do not oppose doing so" – then Res-Care could not have

been found to have breached its contractual duties as a matter of law. *Compare Ligas*, 478 F.3d 773 and App. A at 19a.

Indeed, these two conflicting pronouncements from the court of appeals will inevitably cause confusion, continued institutionalization and seclusion for people with disabilities, and litigation between landlords and operators of institutions. On the one hand, Medicaid providers like Res-Care must comply with the integration mandate or risk loss of Medicaid licensure or exposure to integration mandate claims brought by people with disabilities or their advocates. On the other hand, providers may arguably be constrained by contracts written in an era when institutions were customary, and the owners of the buildings that house the ICF/MRs could allege breach of those contracts.

Res-Care asks this Court to clarify how the integration mandate should be implemented and confirm that when the three criteria enunciated in *Olmstead* (and present here) exist, the integration mandate *requires* community placement. Res-Care requests that the Court bar enforcement of contracts that would bind ICF/MR operators otherwise. Alternatively, Res-Care contends that the court of appeals should have resisted entering summary judgment without the full factual development envisioned by the district court.

B. The Commonwealth of Kentucky Supported Res-Care's Public Policy Defense and the Right of Excepticon Residents to Move into the Community.

Res-Care did not act unilaterally in believing that it was required by the integration mandate to help its residents move into the community. For example, as noted above, Protection & Advocacy filed an amicus brief (App. E at 49a) on behalf of the Excepticon residents to support their right to move into

the community regardless of whatever contract rights Omega asserted. Similarly, the Commonwealth of Kentucky's Cabinet for Health Services also filed an amicus brief with the district court (App. F at 60a) to explain the integration mandate and to support Res-Care's role in helping to integrate the residents of Excepticon into the community.

Kentucky's Cabinet for Health Services described the nature of ICF/MR services and the "Conversion Waiver" authorized under the Medicaid Act, and explained how the Commonwealth worked with Res-Care "to promote the transfer of any residents who chose to live in community-based settings." App. F at 61-63a. The Commonwealth applied to the Health Care Financing Administration for the Conversion Waivers, and nearly all of the residents chose to move to the community. App. F at 63a. (A small number were too medically fragile for community living.)

Protection & Advocacy argued for the right of Excepticon's residents to move into the community and to receive their support services under the Conversion Waiver instead of through the ICF/MR. App. E at 51-52a. Protection & Advocacy emphasized that the Excepticon residents had the right to services in the least restrictive environment under both Kentucky law and the integration mandate. App. E at 51-52a. Protection & Advocacy also emphasized that the right to move belonged to the *residents*, not Omega or Res-Care. App. E at 53a. Moreover, Kentucky had applied the three factors from *Olmstead* (*see Olmstead*, 527 U.S. at 587) for the residents of Excepticon and decided to provide community services for them. App. E at 52a.

Significantly, the amicus briefs also described how the Commonwealth itself intended to comply with the federal integration mandate – and Kentucky's own commitment to

integration which had evolved "as part of a national consensus that is sharply critical of segregated institutions." App. F at 64a. The Commonwealth of Kentucky concluded that it was *required* by the integration mandate "to allow Excepticon's residents to transfer, notwithstanding Omega's leasehold claims." App. F at 68a. Additionally, the Commonwealth urged the district court "to take appropriate action and grant such relief as [would] allow Res-Care to proceed as quickly as possible and as orderly as possible with all necessary steps for the careful and orderly transfer of the Excepticon residents." App. F at 71a. Similarly, Protection & Advocacy implored the district court to allow the residents of Excepticon to exercise their choice to move into the community. App. E at 54a.

Unfortunately, the court of appeals disregarded the filings by the Commonwealth and Protection & Advocacy. Nevertheless, those amicus briefs confirm that the integration mandate required Res-Care to cooperate with state and federal agencies and to comply with the mandate to serve people with disabilities in the least restrictive settings possible. Given Omega's claim for millions of dollars in damages that Res-Care now faces in the further proceedings ordered by the court of appeals, the only adequate way to uphold the public policy of the integration mandate is to override private contractual restrictions such as those relied upon by Omega. *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948).

C. The Integration Mandate Should Continue to Promote Movement from Large Institutional Facilities like Excepticon.

Putting the integration mandate into its historical perspective provides additional foundation for this Petition. The use of large institutional facilities like Excepticon arose

from societal attitudes in the late 19th and early 20th centuries that promoted the use of segregated housing for people with disabilities. As Justice Marshall explained in *City of Cleburne v. Cleburne Living Center, Inc.*, such segregated institutions often had lamentable origins. 473 U.S. 432, 461-62 (1985) (concurring in part and dissenting in part). During that period,

> social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble minded" as a "menace to society and civilization ... responsible for many, if not all, of our social problems."
>
> A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."

Id. (footnotes omitted).

These discriminatory attitudes and practices have been replaced in recent decades with a vigorous public commitment to integrate people with disabilities into the community. For example, in 1973, Congress enacted the Rehabilitation Act prohibiting exclusion or denial of benefits based upon a person's disability. 29 U.S.C. § 794(a) (2005). Regulations promulgated under the Rehabilitation Act require that "any program or activity that receives or benefits from federal

financial assistance ... shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.51(a), (d) (2006). In 1990, Congress further specified that segregation is a form of discrimination and identified the goal of "assur[ing] ... independent living" for people with disabilities. ADA, 42 U.S.C. § 12101(a)(2), (8) (2005). Finally, the Attorney General issued the "integration regulation" under the ADA, which specifically mandated that "a public entity shall administer services, programs, and activities in *the most integrated setting appropriate* to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2006) (emphasis added). *See also City of Cleburne*, 473 U.S. at 461 n.5 (isolating people with mental retardation "deprives [them] of much of what makes for human freedom and fulfillment – the ability to form bonds and take part in the life of the community"); App. F at 64a (Kentucky's Cabinet for Health Services amicus brief, recognizing the significant evolution of the commitment to serve people with disabilities in their communities instead of segregated institutions).

Public consensus and corresponding federal and state policies now reject the use of institutional facilities to provide residential services for people with disabilities unless those individuals have extraordinary medical or behavioral needs. This has resulted in a dramatic shift toward integrating people with disabilities into their communities and providing residential services in the "most integrated setting appropriate" such as apartments, group homes, and other supported living arrangements.

Indeed, following *Olmstead*, government authorities have reaffirmed and intensified their commitment to implementing the integration mandate. On July 1, 2000, President Clinton issued a proclamation to commemorate the tenth anniversary

of the ADA and the 25th anniversary of the Individuals with Disabilities Education Act. Proclamation No. 7327, 65 Fed. Reg. 41,865 (July 1, 2000). He stressed that the ADA "signaled a transformation in our Nation's public policies toward people with disabilities. America is now a dramatically different - and better - country because of the ADA." *Id.* To achieve the ADA's goals, President Clinton promised to work with the states "to implement the Supreme Court's 1999 *Olmstead* decision, which prohibits unjustified isolation of institutionalized persons with disabilities... ." *Id.*

This commitment was endorsed by President George W. Bush. On June 18, 2001, President Bush issued an Executive Order that clearly identified the public policy that supports the assistance that Res-Care provided to its residents. For example, President Bush reaffirmed the commitment of the United States to community-based alternatives, recognizing that "such services advance the best interests of Americans." Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001). Moreover, the Executive Order recognized that segregation is a form of discrimination and that when people with disabilities want to live in the community, when their treatment professionals determine that community living is appropriate, and when the state has resources available, integration into the community is required under *Olmstead*. *Id.* President Bush ordered "swift implementation" of *Olmstead* with a concerted effort between the federal government and the states. *Id.* As part of this "New Freedom Initiative," nine federal agencies reported to the Department of Health & Human Services and President Bush in March 2002 regarding their strategies to implement the integration mandate.

Instead of recognizing the full scope of these legislative and executive declarations of public policy of community

integration, the Seventh Circuit opinion below barely conceded their existence. App. A at 20a. The court commented, "*To the extent that there is a public policy on community-based care*, it is a mandate that individuals be given choices ... ." *Id.* (emphasis added). Thus, in addition to minimizing the significance of *Olmstead*, the court of appeals effectively disregarded ample history and federal and state authority that should have compelled an opposite conclusion. The court of appeals apparently recognized the larger meaning of *Olmstead* less than a month later in *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007) (integration mandate is violated where people with disabilities are "force[d]" to live in institutions "when they are able to live more fully integrated into society at large and do not oppose doing so"). But that was too late for Res-Care, and will only generate confusion and further litigation.

Through decades of work by countless individuals, groups and legislative bodies, this nation now leads the world in providing services to people with disabilities. Unfortunately, the court of appeals has upheld Omega's formalistic contractual disregard of this progress and, in doing so, has reestablished an imposing obstacle for people with disabilities who want to move out of institutions. The decision penalizes Res-Care for its compliance with the integration mandate, and thus will surely discourage the efforts of other operators to implement the integration mandate as well.

CONCLUSION

The decision of the court of appeals in this case conflicts with the integration mandate and undermines this Court's decision in *Olmstead*. If the Seventh Circuit opinion is allowed to stand, it will have a severe chilling effect on the willingness of residential service providers to work with state

and federal Medicaid officials to reduce the reliance on institutional facilities and instead provide services in the community. As a result, people with mental retardation and developmental disabilities who rely on private operators of ICF/MRs may be stuck in these large institutions for long years to come, instead of being able to move into community settings.

The guidance of this Court is necessary and critical to protect people with mental retardation and other disabilities and to enforce the integration mandate. Accordingly, the Petition for Writ of Certiorari should be granted, and summary judgment in favor of Res-Care should be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

No. 06-1157

[Filed January 22, 2007]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff-Appellant*,	)
v.	)
RES-CARE, INC., *Defendant-Appellee.*	)

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 99 C 862—Richard L. Young, Judge.

ARGUED SEPTEMBER 7, 2006—
DECIDED JANUARY 22, 2007

Before RIPPLE, KANNE, and WOOD, *Circuit Judges*.

OPINION

KANNE, *Circuit Judge*. This diversity case concerns the lease and administration of a residential healthcare facility in

Lexington, Kentucky.[1] The appellant, Omega Healthcare Investors, brought suit against Res-Care alleging, among other things, breach of contract. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of Res-Care. Omega appeals. For the reasons set forth below, we reverse the judgment of the district court and remand for further proceedings.

I. HISTORY

In 1989, Omega's predecessor in interest entered into a ten-year lease with Robert E. Petrie for certain property, referred to in the lease as the "Lexington Campus" but referred to by the parties during this litigation as the Excepticon Facility (Excepticon).[2] The property was a healthcare facility designed to house and care for patients with developmental disabilities. In the accepted language of the time, this was referred to as an Intermediate Care Facility for the Mentally Retarded (ICF/MR).

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[1] Because seven of the eight facilities that were the subject of the original complaint were located in Indiana, venue in the Southern District of Indiana was proper. By the time it reached this court, the only remaining issue of contention concerned a single facility in Lexington.

[2] The parties to the original lease were Angell Real Estate Company and Robert Petrie. The parties to the accompanying Management Agreement were Petrie and Res-Care Health Services, Inc. Omega is Angell's successor in interest, and Res-Care is Res-Care Health Services' successor in interest. For clarity, except where necessary, we will refer to "Omega" and "Res-Care" uniformly even where actions were actually taken by Omega's predecessor in interest or Res-Care's predecessor in interest.

Because Omega, a real estate investment trust, could not operate a medical facility, the lease envisioned that Omega would rent the facility to Petrie and that Petrie would acquire the necessary licenses to run the facility. However the actual day-to-day management of Excepticon was to be performed by a third party--Res-Care. To that end, Petrie and Res-Care simultaneously entered a second contract, referred to as the Management Agreement. The Lease (between Omega and Petrie) and the Management Agreement (between Petrie and Res-Care) each make reference to the other document.

For about eight years, the three parties happily coexisted, Omega as the lessor of the property, Petrie as the lessee of the property, and Res-Care managing the property. But in 1998 the environment began to change when Res-Care purchased all of the Petrie rights and obligations under the Management Agreement and the Lease from the Petrie estate. At this point there were only two parties--Omega owned the property and leased it to Res-Care, who became both the lessee and also the day-to-day manager of operations in the facility.

Over the course of 1998 and 1999, Res-Care began a process of working with the Commonwealth of Kentucky to move the patients out of the Excepticon Facility and into non-institutional community-based care. However, Kentucky would not be able to pay Res-Care to manage the community-based treatment for the former residents of Excepticon as long as Excepticon was still open and certified to provide care for the developmentally disabled patients. By shutting the doors to Excepticon, Kentucky would be able to apply for federal funding for the residents to move into community care under a program called a conversion waiver, a waiver that would not be available if Excepticon was still operating.

Res-Care then did the following three things: it sought and received an order from the district court to prevent Omega from reclaiming possession of the property at the natural termination of the Petrie lease; it helped the residents of Excepticon move into community-based care arranged by Res-Care; and (once the patients were removed) it closed the ICF/MR. With those preconditions met, Kentucky was able to rescind its certificate of need for an ICF/MR, and federal funding for community-based care was approved. When Omega regained possession of Excepticon from Res-Care, it had no patients, no employees, and was no longer certified for use as an ICF/MR in Kentucky.

Omega brought suit. Over Res-Care's objection, the district court gave Omega leave to file a Third Amended Complaint on July 31, 2002. This complaint contained five counts. During the Spring and Summer of 2003, the parties filed cross-motions for summary judgment. Omega moved for summary judgment on Counts I and V. Res-Care moved for summary judgment on Counts I, II, IV, and V. On December 4, 2003, the district court entered judgment granting Res-Care's motion for summary judgment on Count V and denying Omega's motion for the same.[3]

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[3] The appellant argues that the district court's order should, in fact, be read as a dismissal for failure to state a claim under FED. R. CIV. P. 12(b)(6). To that end, Omega has filed a new lawsuit in the district court with an eye toward more specifically pleading breach of contract. It is true that the court did use the term "dismissed" in resolving the claim and relied almost exclusively on the content of the plaintiff's complaint. But the court also looked to one affidavit and to the briefs of the parties. Because the parties and the court made reference to materials outside the pleadings, Rule 12 would have required that the motion be considered under Rule 56 anyway, which we will do. FED. R. CIV. P. 12(c) ("If, on a

For two more years, the parties argued about the remaining four counts. By December 27, 2005, the parties had reached a settlement agreement on those four counts, and the district court entered an order dismissing all remaining claims and making the 2003 judgment on Count V a final and appealable order. Omega appeals the order granting summary judgment to Res-Care on Count V.

There is no disagreement that Excepticon was very nearly fully-staffed and fully-occupied when Res-Care assumed the obligations of the lessee in 1998. By the time Res-Care returned the premises to Omega at the end of 1999, the facility was empty. At the heart of this dispute is a disagreement about whether Res-Care owed any duty to run Excepticon in a particular manner during the years 1998 and 1999, and if so whether it breached those obligations. Because the complaint and Omega's motion for summary judgment alleged that Res-Care's behavior violated both the Lease agreement and the Management Agreement, we will consider them separately. At some points the consideration of one necessarily implies consideration of the other.

II. ANALYSIS

We review an appeal of summary judgment *de novo*. *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006). On summary judgment, a party is entitled to judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

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motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .").

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). We view all facts and draw all inferences in the light most favorable to the non-moving party. *Tanner v. Jupiter Realty Corp.*, 433 F.3d 913, 915 (7th Cir. 2006).

In its motion for summary judgment, Omega clarified exactly how it believes that Res-Care breached its two contracts. It alleged that many of the acts that Res-Care took in conjunction with the Commonwealth of Kentucky in 1998 and 1999 constituted breaches of the Management Agreement that was originally signed by Res-Care and Petrie. Omega also alleged that those same actions violated paragraph 23 of the Lease. It further alleged that Res-Care had breached paragraphs 9 and 36 of the Lease, independent of any breach of the Management Agreement. Finally, Omega noted that under the Lease, if the court believed that the Management Agreement had been terminated that such termination was a further violation of Lease paragraph 25.

For reasons that are unclear, Res-Care has contended for several years now that the Third Amended Complaint only alleged a breach of the Management Agreement, and said nothing about the Lease. There is simply no way that this argument can be squared with the plain language of the complaint. For example, paragraph 105 of the complaint reads, in its entirety: "Res-Care refused to surrender control and operation of the Lexington facility at the termination of the Lease, and continued to operate the facility in violation of the lease surrender provisions from the termination of the Lease through December 31, 1999." Likewise, paragraph 106 reads: "Defendant's conduct in refusing to surrender the leased facility at the termination of the Petrie Lease Agreement constituted a breach of that written contract." Paragraph 107 reads: "Defendant's conduct . . . constituted

multiple breaches of the Petrie Lease and the Defendant's Guaranteed Management Agreement." How it could be possible to read these three paragraphs as dealing exclusively with the Management Agreement defies explanation.

A federal complaint requires only a short and plain statement of the claim. FED. R. CIV. P. 8(a). A plaintiff in federal court "need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of." *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005). This defendant was on notice that Count V pleaded not only a breach of the Management Agreement but also of the Lease agreement. Repeatedly denying this fact does not change reality. Res-Care is entitled to take issue with questions of fact and law as presented by Omega in its motion, but Res-Care is not entitled to pretend, *ipse dixit*, that entire portions of the complaint and entire pages of the plaintiff's memorandum supporting its motion for summary judgment simply do not exist. We will consider each alleged breach of the two contracts in turn.

A. Breach of the Management Agreement Itself

The terms of the Management Agreement that Omega believes were breached can be summarized as follows: the contract required that the manager of the property would "maintain and operate the facility in compliance with the standards for state licensure . . . sufficient to maintain a license as an ICF/MR facility" and "not do or permit to be done any act or thing which . . . is incompatible with its operation as an ICF/MR facility." Management Agreement § II(d), § II(h). Additionally, it was a "goal" that the manager "seek to maintain appropriate and adequate relationships with referral sources sufficient to maintain 99% occupancy." Before considering the evidence to support these allegations,

we must (as did the district court) consider Res-Care's legal argument that the Management Agreement had ceased to exist when Res-Care bought out Petrie and became both the lessee and the manager. We agree that the Management Agreement ceased to exist on January 1, 1998.

The Management Agreement on its face is a contract between Petrie and Res-Care. The first question faced by the district court and by this court is whether Res-Care's acquisition of Petrie's rights and obligations under the Management Agreement made that agreement void. We conclude that it did.

The principle involved here was summarized in the Restatement of Contracts §April 10, 2007 451: "Where a person subject to a contractual duty, or to a duty to make compensation, acquires the correlative right in the same capacity in which he owes the duty, the duty is discharged." The comments and examples clarify. "A legal duty cannot be owed by a person to himself acting in the same capacity." RESTATEMENT (FIRST) OF CONTRACTS § 451 cmt. a (1932). "A owes B $100. A is B's next of kin, and B dying without a will A inherits all of B's property. A's duty to B is discharged." RESTATEMENT (FIRST) OF CONTRACTS § 451 ill. 1 (1932).

Although the Kentucky case law on the topic is scant, it supports the view that Kentucky follows the Restatement. Res-Care cites to *Allin v. Shadburne*, 31 Ky. (1 Dana) 68 (Ky. 1833), for the long-standing proposition[4] that a party

[4] We recognize that "long-standing proposition" is a party's shorthand for being unable to find an authority more recent than the 19th century. Nevertheless, it appears to remain good law.

cannot contract with itself. Although that case had not been mentioned in the courts of Kentucky since 1904, *see United Loan & Deposit Bank v. Bitzer*, 117 Ky. 443, 78 S.W. 183, 184, 25 Ky. L. Rptr. 1538 (Ky. 1904), we can find no authority to suggest that this does not remain the law of contract in the Commonwealth of Kentucky. We agree that under Kentucky contract law the Management Agreement was nullified when Res-Care bought Petrie's interest in 1998 and therefore could not have been breached.

Omega makes two counter-arguments on appeal. Omega claims that it was an intended third-party beneficiary to that contract and that the two contracts were actually a single three-party contract and therefore Res-Care is not the only party on both sides of the Management Agreement. Because Omega did not raise either of these arguments in the district court they have been forfeited for the purposes of this appeal. *Coker v. TWA*, 165 F.3d 579, 586 (7th Cir. 1999).

B. Breach of Paragraph 23 of the Lease

Omega argued in the district court and properly preserved for appeal its contention that the *terms* of the Management Agreement were also incorporated into the Lease. *See* Pl. Mem. Supp. Summ. J. 2 ("However, the Lease Agreement made clear that the terms and provisions of the Management Agreement were a part of the Lease with Omega, and the breach of any of those terms and provisions would constitute a breach of the Lease."). We agree with Omega.

Under Kentucky law, a contract can incorporate terms by reference to outside sources. *Bartelt Aviation, Inc. v. Dry Lake Coal Co.*, 682 S.W.2d 796, 797 (Ky. Ct. App. 1985) ("[W]hen a signature is placed after clear language has expressed the incorporation of other terms and conditions by

reference, it is a logical inference that the signer agrees to be bound by everything incorporated.").

Paragraph 23 of the Lease reads, "Lessor approves the entry by Lessee simultaneously with the execution of this Lease, into a Management Agreement (herein the "Management Agreement") of even date . . . a true and correct copy of which is attached hereto as Exhibit C and *made a part hereof.* Lessee agrees that it will not consent to any modification or amendment of the management agreement without the prior written approval of the Lessor." Lease P 23 (emphasis added). Omega argues that this paragraph was sufficient to incorporate the Management Agreement into the Lease.

Paragraph 23 of the Lease is unambiguous, and the interpretation of unambiguous contract provisions is a question of law. *First Bank & Trust v. Firstar Info. Servs. Corp.*, 276 F.3d 317, 322 (7th Cir. 2001). The only sensible way to interpret paragraph 23 is that the parties to the Lease (Omega and Petrie) intended that the specific provisions of the Management Agreement were a part of the basis of their bargain--that operation of the facility in a particular manner was necessary to protect the interests of the parties to the Lease. This view is supported by reading Lease paragraph 23 in conjunction with Lease paragraph 25. *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384-85 (Ky. Ct. App. 2002) ("Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible.") (internal citation and quotations omitted). Not only was any change to the facility's management subject to Omega's approval, any lapse of the Management Agreement constituted breach of the Lease by Petrie. We are convinced that the terms of the Lease are clear

and that the contract incorporates the provisions of the Management Agreement into the Lease.

Of course Res-Care, in its role as manager of Excepticon, could not be bound by a contract between Omega and Petrie. But on January 1, 1998, Res-Care also became the lessee of the facility, and was bound by the obligations that Petrie had agreed to in the Lease, just as (Res-Care agrees) it assumed Petrie's obligation to pay rent to Omega. As Res-Care acknowledges in its brief, by January 1, 1998, there was no longer a manager of Excepticon: there was only a lessor and lessee. Res-Care, as the lessee, accepted the terms of the Lease.

However, Res-Care submits that Omega consented to the sale of the Petrie assets to Res-Care. Omega's admissions in a separate pleading before a Kentucky administrative agency support the view that Omega consented to the substitution of *parties* to the two contracts, but Res-Care provides nothing to suggest that Omega consented to any alteration of the *terms* under which the facility would be managed. The lessee of the facility, first Petrie and then Res-Care, agreed to manage the facility in accordance with certain standards. Those were memorialized in the Management Agreement between Petrie and Res-Care, but we conclude that as incorporated terms they were also binding on Petrie as lessee and later Res-Care as lessee under the separate Lease. Whatever effect substituting the parties had on the Management Agreement, there is no indication that the incorporated terms of the Lease were changed thereby.

The only remaining question for this court is whether the legal demise of the Management Agreement prevents the incorporated terms from being effective as part of the separate Lease Agreement. We are forced to look as far back as 1922

in Kentucky to find an answer to that question. In *Torian v. Hibbs'*, 196 Ky. 784, 245 S.W. 502 (Ky. 1922), the court held that parties to a contract could properly incorporate the terms of a previous expired and unenforceable contract into a different contract. Finding nothing to suggest that this is not the case today, we believe that under Kentucky law the terms of the Management Agreement, not having been modified by the parties to the lease, remained binding on the lessor and lessee despite the legal lapse of the separate Management Agreement.

The facts, even when viewed in the light most favorable to Res-Care, are sufficient to establish that Res-Care breached the terms incorporated into paragraph 23 of the lease.[5] The affidavits and depositions that accompanied Omega's motion for summary judgment established the facts that follow. Sometime after Res-Care assumed Petrie's obligations under the lease in 1998, Res-Care approached Kentucky about moving patients from the Excepticon facility into the community. This is corroborated not only by depositions of Kentucky officials but also by admissions of Res-Care's officers. *See* Morse Dep. at 7:1-7:5; Geary Dep. at 73:7-73:25. In fact, Res-Care had drawn up a plan for how it would close Excepticon and convert the certified need for the ICF/MR beds into community-based care for those patients. *See* Kelley Dep. at 80:6-82:19. Kentucky officials informed Res-Care that any funding for community-based care would be conditioned on closing Excepticon. *See* Morse Dep. at

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[5] Res-Care's brief in this court does not address any of the facts that Omega presented as not being in dispute, relying instead on two purely legal arguments: that there was no contractual duty, or alternatively that even if there were any duties owed to Omega that public policy prevented following through on them.

7:13-8:7. Res-Care informed Kentucky that it was in a position to permanently close Excepticon. *See* Boyd Dep. at 9:21-10:19. Although the parties have now quibbled for years over whether "eviction" is the proper description, officials from Kentucky confirm that the residents of Excepticon were not given the choice to remain in Excepticon (even though they eventually left of their own free will, having been informed that the facility was closing). *See* Boyd Dep. at 18:6-18:8, 33:25-34:7. Kentucky informed Res-Care that the process of shifting the patients from Excepticon to the community would result in the revocation of Excepticon's license to continue operating as an ICF/MR. *See* Morse Dep. at 7:13-8:7. Res-Care's general counsel admitted that closing the facility was incompatible with its continued operation as an ICF/MR. *See* Waskey Dep. at 72:8-72:11. At the time that the patients were being moved from Excepticon, there was a waiting list for Medicaid-funded beds in ICF/MRs in Kentucky. *See* Boyd Dep. at 20:6-20:10.

There are no material facts in dispute. Over the course of two years, Res-Care initiated a plan to move the patients from Excepticon into the community. Res-Care approached Kentucky and offered to close Excepticon. As patients were placed into the community, Res-Care did nothing to bring new patients into the facility off the waiting list. Res-Care knew that its actions were incompatible with Excepticon's continued operation as an ICF/MR and incompatible with Excepticon's continued licensure as an ICF/MR. Res-Care's actions as lessee were in violation of the terms incorporated into the Lease by paragraph 23. Barring success on Res-Care's affirmative defense of a public policy exception (see Part II.F below), Omega is entitled to judgment as a matter of law for breach of the incorporated terms of paragraph 23 of the Lease.

C. Breach of Paragraph 9 of the Lease

Omega argued in its motion for summary judgment that Res-Care breached Paragraph 9 of the Petrie lease, entitled "Alterations." It reads, in relevant part, that the "[l]essee shall not make any alterations or additions to the Demised Premises without Lessor's prior approval." The definition of the Demised Premises is provided in paragraph 1 as:

> assets, rights, interests and other properties owned by the lessor and relating to the Facility . . . [including] . . . (c) Appurtenances: all tenements, hereditaments, rights, privileges, interests, easements and appurtenances belonging or in any wise pertaining to the Parcel and/or the Improvements . . . .

Omega argues that Res-Care impaired Omega's rights, privileges, and interests during the term of the lease by destroying or impairing the Medicaid certificate of need (CON) for the slots at the Excepticon ICF/MR. Omega argues that those impairments constitute an alteration of the demised premises in violation of paragraph 9.

Because Omega is a real estate investment trust, and not a medical service provider, Res-Care argues that the CON could not possibly have been among the rights, privileges, or interests that ran as part of the demised property. Res-Care's argument is supported by the fact that the lessees and managers of Excepticon have been the ones who applied for and received the various licenses and CONs throughout the term of this Lease. In fact, it was the operators and managers exclusively who had ever acquired any "right" or "privilege" to operate the facility under a CON. Since this was not part of the premises that Omega's predecessor had demised to Petrie, its absence upon lease termination could not be an

alteration of the premises. The CONs and any other right to operate the facility were simply never leased from Omega to Petrie and their absence does not violate paragraph 9 of the Lease.

D. Breach of Paragraph 36 of the Lease

Paragraph 36 of the Lease is extensive, occupying more than two single-spaced pages of the original contract. It is entitled "Surrender; Obligations Upon Expiration or Termination." While much of the boilerplate in the paragraph is inconsequential to this case, Omega alleged in its motion for summary judgment that there are four specific clauses in paragraph 36 that Res-Care had breached. Paragraph 36(a) required that the lessee "shall [upon the termination date] well and truly surrender and deliver the Demised Premises into the possession and use of the Lessor without fraud or delay." Paragraph 36(c)(2) required that upon surrendering the premises the lessee must warrant that "[t]here is no outstanding written notice of default, cancellation or termination in connection with any instrument or document which could be construed, directly or indirectly, to bind or in any way affect Lessor or Lessor's assigns after the termination hereof." Paragraph 36(d) required that the lessee shall "use its best efforts to persuade such personnel of the Facilities as Lessor may designate to become employees of Lessor or Lessor's assigns after the expiration or termination of the term hereof." Finally, paragraph 36(f) required that the lessee must allow the lessor to use the lessee's Medicaid provider number for a short period after surrendering the premises until the lessor acquired its own provider numbers so that it could continue to bill Medicaid during the transition period.

There is no doubt that Res-Care did not initially surrender the demised premises as required by paragraph 36(a). The parties agreed to an order, entered by the district court on October 26, 1999, that allowed Res-Care to remain in possession of the premises until December 31, 1999. Because Omega agreed to allow Res-Care to remain in possession, such possession cannot of itself be grounds for a claim for breach of paragraph 36. KY. REV. STAT. ANN. § 383.160 (West 2006) (permitting the parties to expressly contract for holdover beyond the day that a lease terminates). But the district court's order also put a limit on what Res-Care could do during this holdover period. By agreement of both parties, paragraph 6 of the October 26 order required that "Res-Care shall not use its hold-over position to impair Omega's ability to continue to operate Excepticon as a Medicaid funded ICF/MR facility."

Reading paragraph 6 of the agreed order in conjunction with the provisions of paragraph 36 of the Lease, which clearly required Res-Care to deliver the premises in such a condition as to be ready to continue operation as an ICF/MR, we conclude that the actions taken between September 1 and December 31, 1999 constituted a breach of paragraph 36 of the Lease. Res-Care was under an obligation to turn over the premises at the end of August. If it had done so, it would have given Omega a partially occupied and staffed ICF/MR that was still licensed. Admittedly, as we held above, Res-Care was already in breach by August 31. But had Res-Care surrendered the premises Omega would have been allowed to look for a new operator to take over the management of the facility. Omega and Res-Care negotiated an extension to that lease turnover date on the explicit conditions--which were consistent with the parties' intentions expressed in paragraph 36 of the Lease--that the facility would still be capable of

being operated as a Medicaid-funded ICF/MR facility when the eventual turn-over occurred.

The facility that Res-Care surrendered was anything but capable of being used as such. We note that the undisputed facts above that put Res-Care in breach of the incorporated management terms apply equally here. The occupants were gone, the staff was gone, and the Commonwealth was pulling the plug on its certification. Although the parties differ in their characterization of how the residents were moved--Res-Care says they all left of their own will, Omega says they were evicted--the parties agree that Res-Care took affirmative steps to place the residents elsewhere and made no efforts to replace them. The parties also agree that Res-Care had been negotiating with Kentucky before the hold-over period to arrange for community-based care, and that the funding of community-based care (and Res-Care's eventual profits therefrom) would depend on the permanent closure of the Excepticon Facility. It is also clear that both parties are in agreement that it was during this holdover period that the *coup de grace* was delivered to Excepticon when its last patient left (or was evicted) and the Commonwealth was free to decertify the facility. On the basis of these actions alone, Omega is entitled to summary judgment on the issue of liability for breach of paragraph 36 of the Lease.

E. Breach of Paragraph 25 of the Lease

Finally, Omega alleged in its motion for summary judgment that any lapse of the Management Agreement would constitute a separate breach of paragraph 25 of the Lease. Pl. Mot. Supp. Summ. J. 3-4 ("The lease also makes the termination of the Management Agreement a breach of the Lease, for which Res-Care would be liable pursuant to its obligations under the Lease terms."). Omega specifically

pointed the court to Lease paragraph 25, entitled "Default, Termination" which reads in relevant part, "The parties hereto agree that notwithstanding any other provision of this Lease, the term 'default' as used in the Lease will also include (i) the termination, either voluntary or involuntary, of the Management Agreement; or (ii) the occurrence of an event of default by either party to the Management Agreement."

Res-Care has based much of its appeal on the (correct) theory that its purchase of the Petrie interests on January 1, 1998, resulted in the termination of the Management Agreement as a standalone contract. But Res-Care did not respond in the district court to Omega's argument that the termination of the Management Agreement would also put it in breach of the Lease. Res-Care's defense to the argument on appeal is to assert (once again) that Omega never made that argument below. Appellee's Br. 32-34. They are incorrect.[6] Having failed to identify any law or facts that would preclude this interpretation of paragraph 25, we find that the lessee (Petrie and Res-Care as his successor) was in default under the terms of the Lease effective January 1, 1998, when the Management Agreement was terminated. The practical effect of this remains to be seen, as there has been no offering of proof of any damages suffered as a result of that default. Those damages, if there are any, will be among the issues addressed on remand.

---

[6] Omega incorporated by reference certain arguments from its brief in *support* of its own motion for summary judgment into its brief in *opposition* to Res-Care's motion. See Pl. Mot. Opp. Summ. J. 20 ("For a detailed description of the Lease terms and provisions and the applicable law, Omega incorporates by reference its Brief in Support of Cross Motion for Summary Judgment, on Count V.").

F. Res-Care's Public Policy Defense

Res-Care has placed much reliance on its argument that public policy prevents the enforcement of the terms of the Lease. In Kentucky, it is "a question of law . . . whether [a] contract, if made, can be enforced, or whether it is void as against public policy." *Hickey v. Glass*, 285 Ky. 848, 149 S.W.2d 535, 536 (Ky. 1941). We consider questions of law *de novo*. This argument fails because it misinterprets the state of the law with respect to integration of the developmentally disabled and it misrepresents the facts of the current case.

Res-Care's argument is that enforcing the terms of the contract "would effectively prevent people with disabilities from leaving large institutional facilities like Excepticon, contrary to clearly stated federal and state public policies." Appellee's Br. 44-45. This argument relies on *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). *Olmstead* stands for the proposition that in order to avoid violating the Americans with Disabilities Act (ADA), the placement of individuals in community-based settings is appropriate "when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 587.

Res-Care's reliance on the integration mandate, as expressed by *Olmstead*, is misplaced. Res-Care overlooks the fact that *Olmstead* requires only that particular individuals be given the choice of community placement or institutional care. *Olmstead* specifically does not stand for the proposition that ICF/MRs must be closed. The Supreme Court explicitly

rejected the argument that Res-Care is now making, that the ADA somehow requires that institutional care be discontinued. "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601-02. Kentucky continued to operate ICF/MRs after *Olmstead*. The depositions that accompanied Omega's motion for summary judgment included assurances from Kentucky officials that there were waiting lists for facilities such as Excepticon and that Kentucky was not in the process of closing other ICF/MRs. *See* Boyd Dep. at 19:16-21:1. Res-Care's CEO admitted during his deposition that the company continued to operate ICF/MRs elsewhere. *See* Geary Dep. at 46:4-47:13. To the extent that there is a public policy on community-based care, it is a mandate that individuals be given choices, not a mandate to force the lessees of institutional facilities to shut the doors of their facilities in violation of lease terms. To suggest that continued operation of Excepticon would be "illegal" was disingenuous at best.

In summary, Robert Petrie, and later Res-Care as his successor, agreed to rent a fully-functional, fully-occupied, and fully-staffed medical facility from Omega. Recognizing that much of the residual value of the facility would depend on its return in substantially the same condition, Omega included certain protections in the lease. Omega required that the facility would be managed in a particular way, specifically requiring that the people who were entrusted with the facility not do anything that would result in its decertification. The terms of the separate Management Agreement were properly incorporated into the Lease. Any deviation from them, or any termination of the agreement, constituted a breach of the lease. Any failure to surrender the premises at the end of the lease period constituted a separate breach of the lease. Res-

Care, as Petrie's successor in the lease, inherited those obligations. Even viewing the facts in the light most favorable to Res-Care, it is clear that Res-Care breached paragraphs 23, 25, and 36 of the lease. Omega is entitled to judgment as a matter of law, however the question of adequate damages is not properly before this court.

III. CONCLUSION

Accordingly, for the reasons set forth above, the judgment of the district court is REVERSED and the case is REMANDED with instructions to enter summary judgment in favor of the plaintiff on Count V of the Third Amended Complaint, and for further proceedings consistent with this opinion.

A true Copy:

Teste:

/s/
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed December 4, 2003]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff,*	)	
vs.	)	IP 99-0862-C-Y/F
RES-CARE HEALTH SERVICES, INC. and COMMUNITY ALTERNATIVES INDIANA, INC. and MARSHALL & STEVENS, INC., *Defendants.*	)	

ENTRY ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I OF PLAINTIFF'S [THIRD AMENDED] COMPLAINT, and PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO COUNT V OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Before the court are the following motions: (1) Defendants' Motion for Summary Judgment; (2) Plaintiff's Cross Motion for Partial Summary Judgment on Count I of Plaintiff's [Third Amended] Complaint; and (3) Plaintiff's Cross Motion for Summary Judgment on Count V of Plaintiff's Third Amended Complaint. For the reasons set forth below, Defendants' Motion for Summary Judgment is **GRANTED** in part, and **DENIED** in part; Plaintiff's Cross Motion for Partial Summary Judgment on Count I is **DENIED**; and Plaintiff's Cross Motion for Partial Summary Judgment on Count V is **DENIED**.

I. Background

On April 25, 2003, Defendants Res-Care Health Services, Inc. (now Res-Care through merger) and Community Alternatives, Inc. (collectively "Res-Care") filed the present motion for summary judgment on Counts I, II, IV, and V of the Third Amended Complaint. On June 30, 2003, Plaintiff Omega Health-Care Investors, Inc. ("Omega") responded by filing cross motions for partial summary judgment with respect to Counts I and V of the Third Amended Complaint. Previously, Omega filed a motion for summary judgment on Res-Care's Fourth Affirmative Defense and a motion for partial summary judgment on Count II of the Third Amended Complaint. Omega's motion for summary judgment on Res-Care's Fourth Affirmative Defense was filed in direct response to Count I of Omega's Third Amended Complaint. Consequently, in the court's Entry dated July 24, 2003, the court addressed the merits of Count I. Similarly, in the court's Entry dated August 28, 2003, in ruling on Omega's motion for partial summary judgment on Count II of the Third Amended Complaint, the court addressed the merits of Count II. As the court denied both motions, the court finds no reason to revisit the merits of Counts I and II in this Entry.

Accordingly, Defendants' Motion for Partial Summary Judgment is **DENIED** with respect to Counts I and II, and Plaintiffs Cross Motion for Partial Summary Judgment on Count I of Plaintiffs [Third Amended] Complaint is **DENIED** for the same reason. Thus, this Entry addresses only Counts IV and V of Omega's Third Amended Complaint.

II. Discussion

A. Count IV, Conversion

Because the court has described the facts of this case at length in previous entries, the court will not rehash the facts for purposes of this motion.

In Count IV, Omega alleges that "Res-Care obtained the agreement of state regulators in Indiana and Kentucky to obtain Medicaid [c]ertification for Res-Care's new group home facilities in return for Res-Care decertifying Omega's facilities in Fort Wayne, Angola, and Sullivan, Indiana and Lexington, Kentucky." (Third Amended Compaint ¶ 86). Omega also alleges that in these secret negotiations with state regulators, Res-Care represented that it was authorized to decertify Omega facilities.[7] *(Id.* ¶¶ 87-88). Finally, Omega alleges that "[t]he effect of Res-Care's action was to convert an intangible, valuable asset, Medicaid certification, belonging to Omega's facilities, to the use and benefit of Res-Care, permanently depriving Omega of its assets' use and benefit." *(Id.* ¶ 89). The consequence of this action was the

[7] The facilities at issue are known as intermediate care facilities for the care of the mentally retarded ("ICF/MRs").

loss of residents in Omega-owned ICF/MR facilities to Res-Care group home facilities.

The elements necessary to establish the tort of civil conversion are found in the criminal conversion statute. *Anderson v. Indianapolis Indiana AAMCO Dealers Advertising Pool,* 678 N.E.2d 832, 838 (Ind.Ct.App. 1997) (citing *DBC Capital Fund, Inc. v. Snodgrass,* 55I N.E.2d 475, 478 (Ind.Ct.App. 1990)). Under Indiana Code § 35-43-4-3, the criminal conversion statute, "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion..." *Id.* The criminal conversion statute has a *mens rea* element, requiring the unauthorized control to be either knowing or intentional. *Catellier v. Depco, Inc.,* 696 N.E.2d 75, 78 (Ind.Ct.App. 1998) (citing *Coffel v. Perry,* 452 N.E.2d *1066,* 1069 (Ind.Ct.App. 1983)). *Mens rea* is not, however, an element of tortious conversion. *Id.*

Res-Care moves for summary judgment on Count IV on grounds that the Medicaid certifications for the facilities at issue were the assets of Res-Care. Thus, as a matter of law, Res-Care did not "convert" them for its own use and benefit.

Omega responds that the Certificate of Need approvals are a necessary prerequisite to the fight to operate a Medicaid-eligible health care business entitled to Medicaid reimbursement. (Affidavit of Tom Reed ¶ 14). Omega argues that the loss of the ICF/MR facilities at issue means that Omega has permanently lost the Certificate of Need approvals for those beds. *(Id.* ¶¶ 13, 16). From Omega's perspective, Res-Care's actions have permanently deprived Omega of the fight to lease its Certificate of Need rights to another operator.

Omega's argument fails for two reasons. First, its Third Amended Complaint alleges that Res-Care converted an intangible asset, Medicaid Certification, an asset "belonging to Omega's facilities, to the use and benefit of Res-Care, permanently depriving Omega of its assets' use and benefit." (Third Amended Complaint ¶ 89). Omega nowhere alleges that Res-Care converted the Certificate of Need approvals. Omega cannot now rewrite its Third Amended Complaint and insist that it meant to allege that Res-Care converted Certificate of Need approvals for the facilities. Omega is bound by its allegations. *American Nurses' Assoc. v. State of Illinois,* 783 F.2d 716, 724 (7th Cir. 1986) (a plaintiff "may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.").

Second, even construing all allegations and facts in the light most favorable to Omega, Omega has failed to come forward with evidence that it actually owned the Certificate of Need approvals. Ownership of the disputed property is a necessary prerequisite to establishing any conversion claim. See I.C. 35-43-4-1(b) (requiring unauthorized control "over property of another"). Because Omega has failed to sufficiently support its tort claim for civil conversion, Omega's conversion claim must be dismissed.

Finally, Omega's conversion claim also fails for one other reason. Under Indiana law, punitive damages are not allowed for a simple breach of contract claim. *See Miller Brewing Co. V. Best Beers of Bloomington, Inc.,* 608 N.E.2d 975, 981 (Ind. 1993). However, "where the conduct of the breaching party independently establishes the elements of a common law tort, and where the proven tort is of the kind for which punitive damages are allowed, then punitive damages may be awarded." *Id.*

Here, the allegations in Omega's tort claim for conversion do not present a separate tort distinct from the breach of contract claims alleged in Counts I and V. The only possible motive for bringing the conversion claim, then, is the possibility of obtaining punitive damages. Indiana courts do not allow plaintiffs to recharacterize contract claims as tort claims for this purpose. *See, e.g., Orkin Exterminating Co. v. Walters,* 466 N.E.2d 55, 58 (Ind.Ct.App. 1984) (abrogated in unrelated part by *Mitchell v. Mitchell,* 695 N.E.2d 920 (Ind. 1998) (plaintiff sought to avoid effect of limitation of liability clause)).

For all of the reasons stated above, Defendants' Motion for Summary Judgment is **GRANTED** with respect to Count IV.

B. Count V, Breach of Contract

In Count V, Omega alleges that, pursuant to a lease agreement dated August 4, 1989, its predecessor-in-interest leased an ICF/MR facility, called the Lexington campus, located in Lexington, Kentucky, to Robert E. Petrie (the "Petrie Lease Agreement"). (Third Amended Complaint ¶ 93). The Petrie Lease Agreement incorporates a Management Agreement dated September 1, 1989, between Robert E. Petrie ("Petrie") and Res-Care. *(Id.* ¶94). Pursuant to the Management Agreement, Res-Care agreed to do the following: (1) "[m]aintain arid operate the facility in compliance with the standards for State licensure" for an ICF/MR facility; (2) "[n]ot do or permit to be done any act or thing which...is incompatible with its operation as an ICF/MR facility"; (3) maintain ICF/MR certification for the facility on an ongoing basis; and (4) "maintain appropriate and adequate relationships with referral sources sufficient to maintain 99% occupancy." *(Id* ¶¶97-99). Omega alleges that Res-Care

breached the Management Agreement by negotiating an agreement with the Commonwealth of Kentucky, whereby Res-Care agreed to transfer all of the residents from the Lexington facility and to close the Lexington facility. (Id. ¶ 101). In exchange, "the Commonwealth of Kentucky agreed to utilize Medicaid funds that would become available by the decertification of the Lexington facility to fund community-based services for the former Lexington facility residents under a Medicaid waiver program, which services would be provided by, and payments made to, Res-Care." *(Id.* ¶ 102). Omega further alleges that Res-Care breached the Management Agreement by refusing to surrender control and operation of the Lexington facility at the termination of the Petrie Lease Agreement, August 31, 1999. (*Id.* ¶¶103, 106).

Res-Care moves for summary judgment on Count V on two grounds: (1)Omega's interpretation of the Management Agreement is void as against public policy given the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999); and (2) the Management Agreement is null and void.

The allegations of Count V are similar in nature to those of Count I. In the court's Entry on Omega's Motion for Summary Judgment on Res-Care's Fourth Affirmative Defense, dated July 24, 2003, the court addressed Res-Care's public policy argument in relation to Count I. After discussing the *Olmstead* decision and its application to the facts of this case, the court concluded that summary judgment should be denied. For the same reasons, the court rejects this argument as a basis to grant summary judgment. The court will discuss Res-Care's second ground for summary judgment - that the Management Agreement is null and void -- in more detail below.

As shown above, Count V focuses exclusively on the terms of a Management Agreement between Robert E, Petrie, the licensee of the Excepticon facility between 1989 and 1998, and Res-Care. (*See* Third Amended Complaint ¶¶ 96-99). Construing the facts in the light most favorable to Omega, the Management Agreement contained contractual obligations which prohibited Res-Care from certain conduct. However, the fatal flaw in Omega's Count V is that Res-Care purchased the assets of Petrie and itself became the lessee of Excepticon in 1998. As a result, the Management Agreement between Petrie and Res-Care became null and void. (Defendants' Ex. 1, Deposition of R. Geary at 90). *See also Swiss Oil Corp, v. Riggsby,* 67 S.W.2d 30, 33 (Ky. 1934) (when a contract's subject matter becomes nonexistent, the contract is terminated as a matter of law).

Omega responds that it was never notified of the subject agreement. In fact, Res-Care specifically notified Omega of its intention to assume Petrie's lease of Excepticon, and Res-Care requested Omega's written consent for the assignment. (*See* Defendant's Reply, Ex. 2, December 31, 1997 correspondence from David S. Waskey to Joe Emanuele). Although Omega never returned an executed document, Omega did consent to the assignment and gave Res-Care permission to become the lessee and replace Petrie. In fact, Omega expressly admitted having consented to the Excepticon assignment in an April 2000 filing with Kentucky's Cabinet for Health Services. (See Defendant's Reply, Ex. 3 ("On or about January, 1998, Omega, at Res-Care's request, consented to the assignment of Petrie's rights and obligations under the lease of the Lexington Campus [i.e., Excepticon] to Res-Care."). Omega's admissions now estop it from denying knowledge of the transfer of the Petrie lease to Res-Care, or

knowledge of the termination of the Management Agreement. *See Walaschek & Assocs., Inc. v. Crow*, 733 F.2d 51, 54 (7th Cir. 1984).

Accordingly, because Omega has failed to identify any contractual obligations that existed as of the time in 1999 that Res-Care's allegedly wrongful conduct occurred, Count V must be dismissed. Defendants' Motion for Partial Summary Judgment on Count V is therefore **GRANTED**, and, for like reasons, Plaintiff's Cross Motion for Partial Summary Judgment on liability as to Count V of the Third Amended Complaint is **DENIED**.

III.Conclusion

For the reasons stated above, the court **GRANTS** in part, and **DENIES** in part, Defendants' Motion for Summary Judgment. Specifically, the court **DENIES** Defendants' Motion with respect to Counts I and II of Plaintiff's Third Amended Complaint, and **GRANTS** Defendants' Motion with respect to Counts IV and V of Plaintiff's Third Amended Complaint. In addition, the court **DENIES** Plaintiff's Cross Motion for Partial Summary Judgment on Count I of Plaintiff's Third Amended Complaint, and **DENIES** Plaintiff's Cross Motion for Partial Summary Judgment on Liability as to Count V of Plaintiff's Third Amended Complaint.

SO ORDERED this 4th day of ~~November~~ December 2003.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District Of Indiana

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Entered February 13, 2004]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff*,	)	
vs.	)	IP 99-862-C-Y/F
RES-CARE HEALTH SERVICES, INC. and COMMUNITY ALTERNATIVES INDIANA, INC. and MARSHALL & STEVENS, INC., *Defendants.*	)	

ORDER ON PLAINTIFF'S MOTION TO RECONSIDER ENTRY OF SUMMARY JUDGMENT ON COUNT V OF THE THIRD AMENDED COMPLAINT

Plaintiff, Omega Healthcare Investors, Inc. ("Omega"), moves the Court to reconsider that part of its December 4, 2003 Entry that granted Res-Care's motion for summary

judgment on Count V of the Third Amended Complaint. In its motion, Omega contends that the court "misunderstood or misapprehended the allegations of Count V of the Third Amended Complaint when it found that Count V 'focuses exclusively' on the terms of a Management Agreement between Robert E. Petrie and Res-Care." (Plaintiff's Motion to Reconsider at 1).

A motion to reconsider is appropriate when the Court has "patently misunderstood a party, made a decision outside of the issues presented to the Court, or made an error not of reasoning, but of apprehension." *RKI,* Inc. v. Grimes, 200 F.Supp.2d 916, 920 (N.D.Ill. 2002). Upon review of the Complaint, the court finds it did not misapprehend or misunderstand the allegations of Count V as argued by Omega. The Complaint clearly referred to the Management Agreement, not the Lease Agreement.

For all of these reasons, Omega's Motion to Reconsider Entry of Summary Judgment on Count V of the Third Amended Complaint is **DENIED**.

SO ORDERED this 12 day of February 2004.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District Of Indiana

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APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Entered July 28, 2003]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff*,	)	
vs.	)	IP 99-0862-C-Y/F
RES-CARE HEALTH SERVICES, INC. and COMMUNITY ALTERNATIVES INDIANA, INC. and MARSHALL & STEVENS, INC., *Defendants.*	)	

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON RES- CARE AND CAI'S FOURTH AFFIRMATIVE DEFENSE

Before the court is Plaintiff, Omega Healthcare Investors, Inc.'s ("Omega") Motion for Summary Judgment on Res-Care Health Service Inc.'s ("Res-Care") and Community Alternatives Indiana, Inc.'s ("CAI") (collectively "Res-Care")

Fourth Affirmative Defense. For the reasons set forth below, the court hereby **DENIES** said motion.

I. Facts

A. The Parties to the Lease Agreements

1. Omega's predecessor-in-interest, Angell Care Limited Partnership ("Angell"), owned three intermediate care facilities ("Facilities") for the care of the mentally retarded ("ICF/MR") in 1986. The Facilities were located in Fort Wayne, Angola, and Sullivan, Indiana. (Plaintiff's Ex. 7).

2. On August 1, 1986, Angell leased the Facilities to Beverly Enterprises-Indiana ("Beverly"), which operated the Facilities from that time until 1993.

3. The terms of the Agreement are outlined in a Master Lease Agreement ("Master Lease"). (Plaintiffs Ex. 3).

4. In 1993, Beverly agreed to sublease the operation of the Facilities to Res-Care and CAI, executing an Agreement with Res-Care ("Sublease Agreement"), and an Indenture of Sublease ("Indenture") with CAL. Plaintiff's Ex. 4; Plaintiffs Ex, 5).

5. CAI is a wholly-owned subsidiary of Res-Care. CAI was created to operate the Facilities which were leased to Res-Care and CA/in 1993. (Plaintiffs Ex. 2 at 135; Plaintiff's Ex. 5).

B. The Specific Lease Provisions

6. When Res-Care entered into the Sublease Agreement with Beverly, it explicitly agreed to be bound by all of the provisions of the Master Lease, as follows:

> Assumption of Contracts. Sublessee [Res-Care] covenants and agrees to assume and be bound to all the terms and provisions of the Contracts and to perform all obligations accruing pursuant to any of them from and after the Effective Date.

(Plaintiff's Ex. 3, p. 24, Article VII, § 7.02).

7. When CAI entered into the Indenture with Beverly, it explicitly agreed to be bound by all of the provisions of the Master Lease, as follows:

> [A]ll the terms, covenants, and conditions contained in the Prime Lease shall be applicable to this Sublease and Sublessee [CAI] agrees to assume and be bound by the same responsibilities, rights, privileges and duties that the Sublessor has from and to owner [Omega]...

(Plaintiff's Ex. 5, p. 8, Article IV, § 4.01).

8. In addition, the Indenture specifically required CAI to use the Facilities as nursing facilities and to return them at the end of the Sublease "in the same condition as on the commencement of the Sublease..." (Plaintiff's Ex. 5, p. 13, § 7.03)

9. The Master Lease stated that "[i]t is the intention of the parties hereto that there shall always be maintained on the Leased Premises a fully furnished and equipped nursing home." (Plaintiff's Ex. 3, § 23.02).

10. The Master Lease also required Res-Care/CAI to use its best efforts to operate the facilities as ICF/MR facilities, and to maintain all certifications necessary for Medicaid reimbursement and licensing.

> Use of Premises. After the Commencement Date and during the entire Term, Lessee shall use or cause to be used the Leased Premises as licensed nursing homes and for such other uses as may be necessary or incidental to such use...Lessee covenants and agrees that during the Term it will use its best efforts to operate continuously the Leased Property as a provider of health care services in accordance with its Primary Intended Use and to maintain its certifications for reimbursement and licensure.
>
> (Plaintiff's Ex. 3, § 6.01).

11. The Master Lease further required Res-Care/CAI upon termination of the Lease Term "to assist in the transition of the Leased Premises in order to continue the business conducted in the Leased Premises in an uninterrupted manner." (Plaintiff's Ex. 3, § 18).

12. The Master Lease provisions also required Res-Care/CAI to surrender each of the Facilities in good condition and repair upon termination of the Master Lease.

> Surrender Upon Termination. Lessee shall, upon termination of the Lease Term...surrender to Lessor the Leased Premises, including, without limitation, all...personal property...and property of Lessor then upon the Leased Premises, in good condition...
>
> (Plaintiff's Ex. 3, § 18).

13. Omega and Res-Care/CAI signed three (3) extensions to the Master Lease and Indenture, with the latest extending the Master Lease and Indenture until August 31, 1998. (Plaintiff's Ex. 7).

C. Res-Care/CIA Closes Omega's Facilities

14. Prior to the expiration of the Master Lease and Indenture, Res-Care took steps to close the Facilities permanently, without Omega's knowledge or consent, by relocating all residents (115 total[1]) and permanently transferring the Medicaid reimbursement associated with the residents. (Plaintiff's Exs. 9C and 9D).

15. Only a "few" of the residents expressed a desire to transfer from the Facilities into group homes or waiver programs prior to Res-Care/CAI's discussions with them about closing the Facilities. (PlaintifFs Exs. 8A, 9A, and 9B; Defendants' Ex. 2, ¶ 4).

---

[1] Omega asserts the total number was 116, while Res-Care/CAI asserts the number was 115.

16. In all, 111 transferred from the Facilities into group homes or waiver programs. The four that stayed in an ICF/MR did so due to medical conditions. (Affidavit of Barbara A. Winters, ¶¶ 4, 6).

II. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if it is outcome determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "genuine" where the evidence "is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

In determining whether a genuine issue of material fact exists, the court must view the record and all reasonable inferences in the light most favorable to the non-moving party. *National Soffit & Escutcheons, Inc. v. Superior Systems, Inc.*, 98 F.3d 262, 264 (7th Cir. 1996). While the moving party bears the burden of demonstrating the "absence of evidence on an essential element of the non-moving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-moving party may not simply rest on the pleadings, but "must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial." *Id.* If the non-moving party fails to make a sufficient showing on an issue with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. *Ripberger v. Western Ohio Pizza, Inc.*, 908 F.Supp. 614, 617 (S.D. Ind. 1995) *(citing Celotex Corp.*, 477 U.S. at 323). "If, however, doubts remain as to the existence of a

material fact, then those doubts should be resolved in favor of the non-moving party and summary judgment denied." *Wolf v. City of Fitchburg,* 870 F.2d 1327, 1330 (7th Cir. 1989).

III. Discussion

Count I of Omega's Third Amended Complaint seeks recovery for breach of the Master Lease, *(see* Findings of Fact 8-11), and is the count significant to this summary judgment motion. Count I alleges, *inter alia,* that Res-Care breached the Master Lease by (1) making a unilateral decision to close Omega's Facilities, without Omega's knowledge or consent, and voluntarily and permanently surrendering the Medicaid reimbursement and funding rights for Omega's Facilities in exchange for the State's agreement to transfer the funding associated with the Facilities to finance programs provided by Res-Care so that Res-Care would receive funding instead of Omega; (2) falsely informing the residents of Omega's Facilities that they would have to leave the Facilities, then giving the residents only the "choice" between a community-based placement administered by Res-Care or transfer to another ICF/MR facility owned by Res-Care; (3) forcing all of the residents to leave Omega's Facilities, and (4) transferring the residents from Omega's Facilities to Res-Care's ICF/MR facilities and community-based living arrangements operated by Res-Care just before expiration of the Master Lease and Indenture.

The Fourth Affirmative Defense was filed as a direct response to Count I. It reads as follows:

> The relief sought by [Omega] in reliance upon lease provisions purportedly restraining or preventing Res-Care from assisting in the transfer of people with disabilities to the least

> restrictive residential settings are barred by the doctrine of illegality and are against public policy and are unenforceable.

(Plaintiff's Ex. 1).

There is a strong presumption of enforceability of contracts which represent the freely bargained agreement of the parties. Courts will refuse to enforce a private agreement on public policy grounds only if the agreement (i) contravenes statute; (ii) clearly tends to injure the public in some way; or (iii) is otherwise contrary to declared public policy. *Continental Basketball Association, Inc. v. Ellenstein Enterprises, Inc.*, 669 N.E.2d 134, 139 (Ind. 1996).

A. Whether the lease agreements contravene statute

Res-Care claims that it should be relieved of its obligations under the Master Lease and Indenture because the enforcement of the same conflicts with federal and state statutory law; specifically, the Americans With Disabilities Act ("ADA") and the Indiana Community-Based Services Statute ("CBSS") codified at Indiana Code ¶ 12-11-1.1-1. (Plaintiff's Ex. 1).

1. The ADA

Title II of the ADA provides in pertinent part that "no qualified individual with a disability shall, by reason of such disability,...be subjected to discrimination by any [public] entity." 42 U.S.C. § 12132. One form of discrimination is the "segregation" of persons with disabilities. 42 U.S.C. § 12101(a). In an effort to combat this type of discrimination, Congress sought to integrate individuals with disabilities into mainstream society, to the extent possible given the

individual's specific needs. This policy is reflected in a Title II regulation called the "integration regulation." This regulation provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1988).

These statutory provisions and regulations were tested in *Olmstead v. L.C.*, 527 U.S. 581 (1999). In *Olmstead*, two mentally disabled women challenged their confinement in psychiatric units under Title II of the ADA, 42 U.S.C. § 12132. The treating professionals of both women concluded that they could be appropriately treated in one of the community-based waiver programs provided by the state of Georgia. *Id.* at 593. However, the state was unable to place them into a waiver program until several years after they were found eligible for transfer due to funding concerns. *Id.* at 593-94.

The plaintiffs in *Olmstead* argued that their placement in a facility unlawfully segregated them from the rest of society in violation of the ADA sections cited above. *Id.* at 591-92. The Court interpreted these provisions to mean that "unjustified isolation... is properly regarded as discrimination based on disability." *Id.* at 597. However, the Court did not conclude that these provisions required the wholesale dismantling of mental health facilities such as Omega's. To the contrary, the court held that the ADA regulations permit a State to take funding concerns into consideration when balancing qualified individuals' need for community-based care with its obligation to provide facilities for those not qualified for such care. The Supreme Court held:

> [U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id. at 607.

Res-Care/CAI argues that *Olmstead* stands for the proposition that, "regardless of any lease terms between Res-Care/CAI, residents must be permitted to leave institutional facilities when, as in this case, their treating professionals determine it is appropriate and resources are available." (Defendants' Response Brief at 23). In other words, it is Res-Care/CAI's contention that Omega's enforcement of the lease provisions would in effect *require* Res-Care/CAI to keep residents at the Facilities *against their will* contrary to a treating professional's opinion that the residents' needs could be met in a community-based program. In support of this contention, Res-Care/CAI cites the court to the Affidavit of Barbara A. Winters, the Vice-President of Operations for Res-Care's Northern Region ("Winters"). *(See* Defendants' Ex. 2). In her affidavit, she states that the residents of Omega's Facilities chose to leave of their own volition. She also states that Res-Care/CAI's decision to aid the residents in transferring to other facilities and/or community-based programs was based on the "integration mandate" of the

ADA, and its belief that Omega's Facilities were inadequate to provide the services that Res-Care/CAI typically provides. *(See, e.g.,* Defendants' Ex. 2, ¶¶ 4-6, 8). According to Winters, this decision was not motivated by profit. *(Id.,* ¶ 8).

As is evident from the filings from Omega, however, Omega firmly believes that these residents were "forced" out of Omega's Facilities and placed into facilities and/or community-based housing administered by Res,Care/CAI for Res-Care/CAI's own financial gain. *(See* Plaintiff's Exs. 8A, 9A and 9B).

While it does seem more than a little odd that 111 out of 115 (or, as Omega asserts, 116) residents "chose" to leave at roughly the same time, just before the end of the lease agreements, the resolution of that matter is best left for a jury. If a jury determines that the facts show by a preponderance of the evidence that Omega's enforcement of the lease agreements required Res-Care/CM to keep eligible residents in Omega's Facilities even though their treating professionals determined that they were eligible for community-based treatment, (and the residents did not oppose such treatment), the enforcement of these provisions could very well violate public policy. On the other hand, if a jury determines that the facts show by a preponderance of the evidence that Res-Care/CAI did breach the lease agreements by "forcing" the residents out of the Facilities for their own financial gain, then, for obvious reasons, Omega's enforcement of the lease provisions would not violate public policy. Because underlying facts are in dispute, the court must deny Omega's Motion for Summary Judgment on Res-Care/CAI's Fourth Affirmative Defense.

2. The CBBA

Indiana law has also adopted a shift in policy toward mainstreaming individuals with disabilities into the least restrictive environment possible. Indiana Code ¶ 12-11-1.1-1 reads in pertinent part as follows:

> (a) The bureau of developmental disabilities services is established within the division.
>
> (b) The bureau shall plan, coordinate, and administer the provision of individualized, integrated community based services for the developmentally disabled individuals and their families, within the limits of available resources.
>
> (c) Services for developmentally disabled individuals must be services that meet the following conditions:
>
> * * * * * *
>
> (5) To the extent appropriate, are provided in home and community-based settings in which individuals without disabilities participate.
>
> * * * * * *
>
> (f) To the extent that services described in Subsection (e) [setting forth categories of community-based services] are available and meet the individual's needs, an individual is entitled to receive services in the least restrictive environment possible;

> (g) Community-based services...must consider the needs of and provide choices and options for: (1) developmentally disabled individuals; and (2) families of developmentally disabled individuals.

Ind. Code ¶ 12-11-1.1-1. *See also* Ind.Code § 22-9-1-2 (1998) (declaring that the public policy of Indiana is to provide equal opportunity in education, employment, and access to public conveniences and accommodations, and to eliminate segregation or separation based on, among other things, disability...).

For the reasons stated in Section III.A. 1, the court finds the same issues of fact must be resolved before the court can determine whether the lease agreements violate the public policy of the state of Indiana. For these reasons, Omega's Motion for Summary Judgment must be **DENIED**.

B. Whether the lease agreements are contrary to public policy

The parties have also briefed the issue of whether the lease agreements are otherwise contrary to public policy. Given that the court has denied the motion for summary judgment based on statutory grounds, the court will leave the resolution of this issue for trial.

IV. Conclusion

For the reasons stated above, the court **DENIES** Plaintiff's Motion for Summary Judgment on Defendants' Fourth Affirmative Defense.

SO ORDERED this 24th day of July 2003.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District Of Indiana

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed September 9, 1999]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff,*	)	
vs.	)	CAUSE NO. IP 99-0862-C-Y/F
RES-CARE HEALTH SERVICES, INC. AND COMMUNITY ALTERNATIVES INDIANA, INC. *Defendants.*	)	

AMICUS CURIAE BRIEF ON BEHALF OF THE RESIDENTS OF EXCEPTICON ICF/MR

Protection and Advocacy (P&A) is a Division within the Department of Public Advocacy in Kentucky State government: It is Kentucky's protection and advocacy system, so designated by the Governor under the authority granted in the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), 42 U.S.C. § 6000, 6042, which also grants certain powers and authority to P&A. Under the DD Act,

P&A is mandated to represent persons with developmental disabilities and authorized to:

> (i)pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic and racial minority groups;

42 U.S.C. § 6042(a)(2)(A). P&A derives additional authority from other provisions of Federal and State law. See, 42 U.S.C. § 10801 et seq., 29 U.S.C. 794e, KRS 31.010(2). Additionally, P&A has standing in its own right to litigate actions that affect the rights of individuals with developmental disabilities and mental illness. Michigan Protection & Advocacy Service, Inc. v. Miller, 849 F.Supp. 1202 (W.D.Mich. 1994); Trautz v. Weisman, 846 F.Supp. 1160 (S.D.N.Y. 1994); and Ruebenstein v. Benedictine Hospital, 790 F.Supp. 396 (N.D.N.Y. 1992).

P&A currently represents three individuals with mental retardation, B.B., J.B., and J.J., who are receiving services at Excepticon, the intermediate care facility for the mentally retarded (ICF/MR) in Kentucky at issue in this case. The services they receive at Excepticon are funded through the Kentucky Medicaid program, the joint federal/state medical assistance program for the indigent. 42 U.S.C. § 1396a. Services through an ICF/MR are optional for the State to

provide through its state plan for medical assistance, 42 U.S.C. §§ 1396a(a)(10)(A) and 42 U.S.C. § 1396a(a)(15), which Kentucky has determined that it will provide. See "Kentucky State Plan for Medical Assistance," Attachment 3.1-A, pg. 7.

ICFs/MR are specially designed institutions to provide care and services to persons with mental retardation and related conditions. An ICF/MR's primary purpose is to furnish health or rehabilitative services to the populations it serves along with services that are above the level of room and board. 42 C.F.R § 440.150. The ICF/MR must also meet strict staffing and treatment standards as outlined in federal law in order to meet the mandate that each person in residence receives active treatment. Id.

Kentucky Medicaid also administers another program through which individuals with mental retardation can receive services. The Supports for Community Living (SCL) waiver, granted pursuant to 42 U.S.C. § 1396n(c), is a Medicaid-funded program designed to provide services that are comparable to the services provided in an ICF/MR to individuals with mental retardation but in a home or community-based setting. The SCL program is a less restrictive alternative to institutional care in an ICF/MR that allows individuals with mental retardation and related conditions that qualify to return or remain in the community. "Supports for Community Living Manual," Department for Medicaid Services, Transmittal #2, Pg. 3.1, incorporated by reference, 907 KAR 1:145 § 8.

B.B., J.B., and J.J., as residents of Kentucky, have a right, under Kentucky law, to services in the least restrictive mode of treatment. KRS 202B.040 and 202B.060; see KARC v. Conn, 510 F.Supp. 1233, 1247 (W.D.KY 1980), affirmed,

974 F.2d 582 (6th Cir. 1982); 28 C.F.R. § 41.51. The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., also mandates that the State provide services in the most integrated setting appropriate to meet the individual's needs. Id., 42 U.S.C. § 12134(b); 28 C.F.R. 35.130. In Ohnstead v.L.C., ___U.S.___, 119 S.Ct. 2176 (1999), the Court found, in interpreting this "integration mandate," that the ADA required the State to provide services to individuals with mental disabilities in community settings rather than institutions when "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individuals, and the placement can be reasonably accommodated..." Id., at p. 2181. The Court went on to affirm that the unnecessary segregation of individuals with disabilities in institutions is discriminatory in violation of the mandates of the ADA. Id., at p. 2185.

Under Kentucky law and the mandates of the ADA and Olmstead, B.B., J.B., and J.J. have the right to be moved to the community. Id.; 42 U.S.C. § 12132; KRS 202B.170. Kentucky Medicaid, in its effort to administer its services, programs, and activities in the most integrated setting appropriate to the needs of the individuals, as mandated under 28 C.F.R. § 41.51 and the Olmstead Court, have decided to provide the residents of Excepticon with SCL services as a less restrictive alternative to their present placement in an ICF/MR. B.B., J.B., and J.J. have all been determined by treatment professionals to be appropriate for community placement, have agreed to such placement, and Kentucky Medicaid has been able to reasonably accommodate the transfer by making placement through the SCL program available to these individuals.

The parties to the present action, however, have agreed to cease the discharge of the residents from Excepticon until this Court determines the rights of the parties. Whether or not the residents should be discharged is not a right belonging to the parties to this action and therefore cannot be relinquished by them.

The right to treatment in the most integrated setting appropriate to meet their needs belongs to the residents of Excepticon, not the Plaintiff or the Defendants. Since the residential treatment which the individuals at Excepticon receive is paid by Kentucky Medicaid via each individual's medical card, the right to treatment which allows such payment belongs to the individuals, not the Plaintiff or the Defendants. Green v. Cashman, 605 F.2d 945, 946 (6th Cir. 1979); Almond Pharmacy v. Mankowitz, 587 F.Supp. 925 (N.D.IL. 1984); IN. Dept. of Public Welfare v. Bair, 463 N.E.2d 1388 (IN.App. 1 Dist. 1984). The Green court in so ruling found:

> We do not find in the statute authorizing Medicare and Medicaid any legislative intention to provide financial assistance to providers of care for their own benefit. Rather, the statute is designed to aid the patients and clients of such facilities. Id., at p. 946.

The outcome of the present case concerning the contract rights of each party should not have an effect upon the rights of the residents of Excepticon to services in the most integrated setting, leaving no reason for this Court to order a delay of their move. The prevailing party in this case will not be guaranteed the opportunity to treat the residents of Excepticon, whether in the facility or in the community, since the residents, as Medicaid recipients, have a right to the free choice of providers among those authorized to provide

services. 42 U.S.C. § 1396a(a)(23); 42 C.F.R. § 431.51. Regardless of the prevailing party in this case, there is no guarantee that the individuals at Excepticon will choose to receive their services from the prevailer, but may choose one of the several other entities within the Commonwealth of Kentucky authorized by Kentucky Medicaid to provide the community services which the residents need and are entitled to receive.

The residents of Excepticon are not "assets" owned or controlled by either party. Any financial interest that either party may have in this case are incidental to their relationship with Kentucky Medicaid and the recipients who choose to receive services from them. Green, supra; IN. Dept of Public Welfare, supra; Almond Pharmacy, supra. Whether or not the recipients can choose to receive services from either party is dependent upon the party's relationship with Kentucky Medicaid and whether Kentucky Medicaid allows the entity to become a Kentucky Medicaid provider. See O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 65 L.Ed. 506, 100 S.Ct. 2467 (1980).

WHEREFORE, Protection and Advocacy requests that this Honorable Court, on behalf of B.B., J.B., and J.J. and others at Excepticon similarly situated, rescind the order denying them their right to leave Excepticon until the resolution of the controversy between the parties and allow them to choose the Kentucky Medicaid provider that they wish to provide them with appropriate services.

Respectfully Submitted,

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AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

Services in an Intermediate Care Facility for the Mentally Retarded

15. a. ~~Nursing facility services~~ (other than in an institution for mental diseases) for individuals who are determined, in accordance with Section 1902(a)(31)(A), to be in need of such care.

[X] Provided: [ ] No Limitations
[X] With Limitations*
[ ] Not provided.

~~b. Including such services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions:~~

~~[X] Provided: [ ] No Limitations~~
~~[X] With Limitations*~~
~~[ ] Not provided.~~

16. Inpatient psychiatric facility services for individuals under 22 years of age.

[X] Provided: [ ] No Limitations
[X] With Limitations*
[ ] Not provided.

17. Nurse-midwife services.

[X] Provided: [X] No Limitations
[ ] With Limitations*
[ ] Not provided.

18. Hospice Care (in accordance with section 1905(o) of the Act).

[X] Provided: [ ] No Limitations
[X] With Limitations*
[ ] Not provided.

*Description provided on attachment.
TX. No. 90-37 Approval Date Nov 14 1994
Supersedes Effective Date 10/1/90
TX No. 90-32

CABINET FOR HEALTH SERVICES
DEPARTMENT FOR MEDICAID SERVICES
SUPPORTS FOR COMMUNITY LIVING MANUAL

SECTION III- OVERVIEW OF THE SUPPORTS FOR COMMUNITY LIVING WAIVER

III. OVERVIEW OF THE SUPPORTS FOR COMMUNITY LIVING WAIVER

A. Target Population

This program was developed for Kentucky residents as an alternative to institutional care for an individual with mental retardation or developmental disabilities who meet the level of care criteria for placement in an Intermediate Care facility for the Mentally Retarded (ICF-MR), and whose services in an ICF-MR would qualify for payment under the State Plan for Medical Assistance. The program allows an individual to remain in or return to the community in the least restrictive setting.

The individual or his legal representative shall be informed prior, to admission to Supports for Community Living (SCL) or an ICF-MR that SCL services are an alternative to ICF-MR services and shall be given the choice between SCL and ICF-MR services.

Applications for SCL services for an individual who meets the ICF-MR level of care shall be reviewed

when a program placement is open, but the Department for Medicaid Services, to determine the appropriateness of the SCL program services to meet the individual's needs. Approval for these services does not guarantee that the service will be available or provided; nor does it guarantee eligibility Medicaid benefits.

SCL services shall not be provided to an individual while he is an inpatient of hospitals, nursing facilities, or ICFs-MR.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed September 9, 1999]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff*,	)	
vs.	)	CAUSE NO. IP 99-0862-C-Y/F
RES-CARE HEALTH SERVICES, INC. AND COMMUNITY ALTERNATIVES INDIANA, INC. *Defendants.*	)	

AMICUS CURIAE MEMORANDUM OF THE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH SERVICES

The Commonwealth of Kentucky, Cabinet for Health Services (hereinafter "the Cabinet"), by counsel, submits this "friend of the Court" Memorandum to assist the Court in the adjudication of the dispute in the above-styled action regarding the Excepticon facility in Lexington, Kentucky. The Cabinet is not a party to this litigation and expresses no

opinion concerning the outcome of the monetary claims between the parties. However, the outcome of this litigation will undoubtedly affect the well-being of the residents in that facility, including the right to live in a community-based setting of their choosing.

I. MEDICAID AND THE "HOME AND COMMUNITY-BASED WAIVER" PROGRAM

The 180 individuals currently residing at the state-licensed Excepticon intermediate care facility for people with mental retardation or developmental disabilities (hereinafter "ICF/MR/DD") all are eligible for and receive a variety of residential, medical and other services reimbursed by Kentucky's Medicaid Program. The Medicaid program, 42 U.S.C. § 1396 et seq, is a federal-state program to furnish persons with public assistance who are unable to meet the cost of necessary medical services. States such as the Commonwealth of Kentucky that elect to participate in the Medicaid program initially pay the entire cost of services provided under the program but later obtain partial reimbursement from the federal government. In order to receive these funds, states must administer their programs according to standards and guidelines issued by the Secretary of the Health Care Financing Administration (hereinafter "HCFA"), and must submit a plan demonstrating compliance with the Medicaid Act. See 42 U.S.C. § 1396a.

A state's Medicaid plan must provide that services under the plan "shall be in effect in all political subdivisions of the state," 42 U.S.C. § 1396a(a)(1), and "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual."

42 U.S.C.§ 1396a(a)(10)(B)(I). These requirements prevent a participating state from providing Medicaid benefits to a single individual or to a group of individuals without offering comparable benefits to all eligible individuals within the state.

The Medicaid Act authorizes waiver of the Act's requirements in specified circumstances, including "to adapt their programs to the special needs of particular groups or recipients." 42 C.F.R. § 430.25(b). The Act authorizes waiver of programs providing home and community-based care to individuals who reside in large facilities or may otherwise require institutionalization. See 42 U.S.C. § 1396n(c); 42 C.F.R. § 435.217. Through the Home and Community-Based Waiver ("HCBW") program, individuals in an ICF/MR/DD facility such as Excepticon may receive Medicaid funds in a home or small home-like setting. "[T]he program contemplates personal privacy and basic freedom to make choices, including choices about when to go to bed and arise. Participants may, to the extent they are able, plan menus, grocery shop and cook. Ideally, the individuals live in residential neighborhoods and have the opportunity to participate in community activities." Cramer v. Chiles, 33 F. Supp. 2d 1342, 1348 (S.D. Fla.1999).

In May 1998, more than fifteen months ago, the Cabinet began working with Res-Care, the licensed operator of the Excepticon facility, to promote the transfer of any residents who chose to live in community-based settings. After extensive discussions with Res-Care representatives and officials in other state agencies, including the Protection and Advocacy Division of the Kentucky Department of Public Advocacy (which is authorized by the federal government to advocate and protect the rights of people with disabilities), the Cabinet filed a request with HCFA in December 1998, to amend its existing HCBW waiver program. The goal was to

begin transferring residents by March 1999, and to complete the transition before the August 31, 1999 termination of Res-Care's lease.

Unfortunately, the Cabinet's initial request was denied by HCFA by letter dated March 26, 1999. The Cabinet resubmitted a revised request on April 5, 1999. HCFA approved this request by letter dated June 18, 1999, which was received by Kentucky on June 21, 1999. In meeting with Excepticon's residents, nearly all of the residents (or their legal representatives) have chosen community-based settings. Most of these community-based facilities, but not all of them, will be operated by Res-Care.

The Cabinet has worked closely with Res-Care and other state agencies to arrange for the Excepticon residents to move to their chosen community-based residential facilities beginning immediately, with all moves scheduled to be completed by December 1999. These moves have now been suspended indefinitely, pending the resolution of the present dispute and Motion for Relief.

II. THE ADA'S MANDATE TO PROVIDE COMMUNITY-BASED RESIDENTIAL SERVICE

Kentucky's General Assembly has specifically declared that every resident of a long-term care facility such as Excepticon has extensive enumerated rights, see Kentucky Revised Statutes (hereinafter "KRS") 216.515(1)-(26). These include rights to be free from mental and physical abuse, and physical and chemical restraints except in emergencies; rights of privacy; rights to manage personal funds, wear personal clothing, and send and receive personal mail unopened; rights to go outdoors and leave the premises unless a legitimate reason can be documented for refusing that activity; rights to

conjugal visits; and rights of confidentiality in their medical records. "Each resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs." KRS 216.515(18). In KRS 216.515(5) the General Assembly has also mandated that "All residents shall be encouraged and assisted throughout their periods of stay in long-term facilities to exercise their rights as a resident and a citizen," now including the rights embodied in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq (hereinafter "the ADA").

While these rights were generally adopted twenty years ago for residents in long-term care facilities, Kentucky's commitment to community-based residential services has evolved significantly since 1989 when Res-Care's predecessor entered into the Excepticon lease with Omega's predecessor. This evolving commitment has developed as part of a national consensus that is sharply critical of segregated institutions. As Justice Thurgood Marshall explained, those institutions often had lamentable origins in the pseudoscientific literature of the late 19th and early 20th centuries, at the same time that racial discrimination was receiving state support. During that period,

> social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble minded" as a "menace to society and civilization ... responsible for many, if not all, of our social problems ....

> A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part) (footnotes omitted).

In recent decades, a consensus has developed that isolating and segregating people with disabilities in institutional settings severely curtails their everyday life activities, including family relations, social contacts, work, educational advancement and cultural enrichment. As Justice Marshall noted, isolating people with mental retardation "deprives [them] of much of what makes for human freedom and fulfillment -- the ability to form bonds and take part in the life of the community." Id., at 461 & n.5.

Thus, Congress has enacted a series of laws intended to promote community-based services. In the Developmental Disabilities Assistance and Bill of Rights Act, Congress specifically declared that "[t]he treatment services, and habilitation for a person with developmental disabilities should be ... provided in the setting that is least restrictive of the person's personal liberty." Pub. L. No. 94-103, 89 Stat. 486, 502 (1975). Congress later amended the Act to assert the "national interest" of promoting the right and opportunity for people with developmental disabilities to be part of the community, "to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens."

42 U.S.C. § 6000(a)(4), (9). Congress also stressed its goal "to promote the inclusion of all persons with developmental disabilities, including persons with the most severe disabilities, in community life." 42 U.S.C. § 6000(b)(5).

Next, in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b, Congress acted to "develop and implement ... comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their integration into the workplace and the community." 29 U.S.C. § 701. Then in 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. In its introductory findings supporting the legislation, Congress expressly noted: "[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[.]" 42 U.S.C. § 12101(a)(2). Accordingly, Congress declared that "the Nation's proper goals regarding individuals with disabilities" included "assur[ing] ... independent living ... for such individuals." 42 U.S.C. § 12101(a)(8).

Title II of the ADA addressed disability discrimination by public entities, and provided in part: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. See generally Crawford v. Indiana Dep't of Corrections. 115 F.3d 481, 487 (7th Cir. 1997) (discussing "Congress's concern that disabled persons are victims of discrimination. Invidious discrimination by governmental agencies, such as Indiana's prison system, violates the equal protection clause even if the

discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5 [of the Fourteenth Amendment].")

The ADA directed the Attorney General to promulgate regulations to implement Title II, see 42 U.S.C. § 12134(a). Pursuant to this authority, the Department of Justice adopted an "integration regulation" mandating that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The preamble to the Title II regulations defined "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt 35, App. A, p. 450 (1998).

In June 1999, the United States Supreme Court upheld the Justice Department's "integration regulation," and held that under certain circumstances - including the circumstances now present in this litigation - the ADA actually "require[s] placement of persons with mental disabilities in community settings rather than in institutions." Olmstead v. L.C., 119 S. Ct. 2176, 2181, 1999 U.S. LEXIS 4368 *13, 1999 WL 407380 (June 22, 1999).

The Court noted that the mandate imposed by the "integration regulation" is not absolute. The regulation itself provided that a public entity could resist providing integrated services if the entity "can demonstrate that making the modifications [required by the regulation] would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). The Olmstead court

clarified the circumstances in which a state or other public entity could invoke this "fundamental alteration" defense, remanding that suit and holding that "[i]n evaluating a State's fundamental alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." 119 S. Ct. at 2185.

There is no doubt that it would place an unreasonable financial burden on Kentucky, and indeed would fundamentally alter this state's Medicaid program, if it were compelled to provide community-based residential services to all of the approximately 1200 people with mental retardation or developmental disabilities in state-licensed long-term care facilities. However, in the present litigation, the Cabinet has worked for nearly a year to structure an affordable program that will allow each of the residents at Excepticon to move to facilities they choose, which in nearly all instances will be community-based facilities. The necessary waiver has been obtained from HCFA, and the Cabinet has worked closely with representatives of other state agencies to insure that the transfer program will not cause unjustified inequities or other unfair results.

In these circumstances, the Supreme Court's Olmstead decision concludes that Kentucky is required by the ADA to allow Excepticon's residents to transfer, notwithstanding Omega's leasehold claims. See Olmstead, 119 S. Ct. at 2181:

> [W]e confront the question whether the proscription of discrimination [in the ADA] may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a

qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

III. LICENSURE OF EXCEPTICON LEXINGTON CAMPUS

In its Verified Complaint, Omega requests the Court to issue a permanent injunction prohibiting Res-Care and CAI from "terminating, providing notice of termination or otherwise jeopardizing any operating license or permit relating to the Current Facilities." Based upon the averments and demands set forth in the Complaint, it is apparent that Omega, Inc. seeks to bypass Kentucky's health facility licensure law by requesting the Court to issue Orders disposing of the license of Excepticon Lexington Campus. Excepticon is licensed by the Cabinet's Division of Licensing and Regulation as an Intermediate Care Facility for the Mentally Retarded and Developmentally Disabled (ICF/MR). The Cabinet would object to the entry of any Order by the Court that may infringe upon or otherwise alter any duty imposed by state law upon the Cabinet to license, supervise or regulate health facilities operating in Kentucky.

Kentucky's health facility licensure laws are set forth in KRS Chapters 216 and 216B. In promulgating this law, the Kentucky General Assembly found that "licensure of health facilities and health services is a means to insure that the citizens of this Commonwealth will have safe, adequate, and efficient medical care..." KRS 216B.010. In accordance with

KRS 216B.042(1)(c), the Cabinet has established comprehensive regulatory standards and procedures for licensing health facilities that are designed to promote the health, safety and rights of residents in such facilities. These regulatory standards relate to, among other things, facility classification, licensing procedures, patient care standards, and safety standards. Any Order of the Court that alters the licensure arrangement of Excepticon Lexington Campus would violate KRS Chapters 216 and 216B.

Pursuant to KRS 216B.040(1), the Cabinet has exclusive jurisdiction over four separate and distinct functions in the administration of the licensure law, including, issuing a "final determination on all actions by the cabinet to deny, revoke, modify, or suspend licenses of health facilities and health services issued by the cabinet". KRS 216B.040(1)(c). Under this statute, only the Cabinet may decide which applicant shall receive a health facility license, and any contracts, agreements, and understandings of private parties to the contrary are invalid and unenforceable.

Furthermore, KRS 216B.105(1) expressly prohibits license holders from transferring licenses, and provides as follows:

> "Unless otherwise provided in this chapter, no person shall operate any health facility in this Commonwealth without first obtaining a license **issued by the cabinet**, which license shall specify the kind or kinds of health services the facility is authorized to provide. **A license shall not be transferable** and shall be issued for a specific location and, if specified, a designated geographical area" (emphasis added).

The license to operate Excepticon Lexington Campus was issued by the Cabinet exclusively to Res-Care, Inc. in 1998. Omega, Inc., is not now nor has it ever been recognized by the Cabinet as a license holder of Excepticon Lexington Campus, and it cannot assume the operation of Excepticon through transfer, informal assignment, or otherwise. Consequently, any Order of this Court that purports to dispose of the license of Excepticon Lexington Campus would likewise be contrary to KRS Chapters 216 and 216B and the administrative regulations promulgated thereunder.

III. CONCLUSION

Whatever may be the outcome of Omega's monetary claims against Res-Care, the Commonwealth of Kentucky respectfully points out that such outcome should not infringe on or other jeopardize any rights of the Excepticon residents to live in their chosen community-based settings as soon as possible. It has been extremely time-consuming and difficult for the Cabinet to arrange the federal approvals, the individual consultation and consents, and the intra-agency coordination required to meet the ADA mandate recognized by the U.S. Supreme Court in the Olmstead decision.

The Cabinet is obligated to "take appropriate and necessary actions that all of the rights of residents in long-term care facilities as defined by KRS 216.515 to 216.525 are upheld." KRS 216.525(2). With these rights in mind, the Commonwealth of Kentucky respectfully urges the Court to take appropriate action and grant such relief as will allow Res-Care to proceed as quickly as possible and as orderly as possible with all necessary steps for the careful and orderly transfer of the Excepticon residents. Furthermore, such relief should also leave intact the license issued for the Excepticon ICF/MR.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH SERVICES

ELLEN M. HESEN
GENERAL COUNSEL

By: /s/Nora K. McCormick

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APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed October 22, 1999]

OMEGA HEALTHCARE INVESTORS, INC., *Plaintiff*,	)	
vs.	)	IP 99-0862-C-Y/F
RES-CARE HEALTH SERVICES, INC. and COMMUNITY ALTERNATIVES INDIANA, INC. *Defendants.*	)	

AGREED ORDER

This matter came before the Court on Defendants' Motion for Relief from the Agreed Preliminary Order entered on June 16, 1999 and Plaintiffs Motion for Emergency Hearing to Show Cause and to Enforce Agreed Preliminary Order. The Court having been apprised that an agreement has been reached on the issues, and having been advised on the substance of the agreement, now approves the agreement.

IT IS THEREFORE, ORDERED that:

1. Defendants (jointly referred to as "Res-Care" for Res-Care, Inc., the successor by merger to Res-Care Health Services, Inc.) may continue to occupy the Excepticon facility as described in the Complaint until December 31, 1999. During that time, hereinafter referred to as the "holdover period," the parties shall comply with all obligations set forth in the expired Lease Agreement, as if the Lease Agreement were still in force and effect, except as modified herein.

2. Res-Care shall pay to Omega Healthcare Investors, Inc. ("Omega") as rent for the holdover period 100% of the rent provided for in the expired Lease Agreement for the months of September, 1999 and October, 1999 and 150% of such rent for the months of November, 1999 and December, 1999, in the manner provided for in the Lease Agreement.

3. Res-Care shall be responsible for the payment of any costs or expense it incurs for the continued operation of the Excepticon facility during the holdover period, and will indemnify and hold Omega harmless from any such expenses, costs, or liabilities arising out of Res-Care's holdover occupancy.

4. During the period of holdover occupancy, any residents (through their legal guardians where appropriate) of Excepticon who request to move from such facility may do so. Omega's failure to oppose the move of such residents shall not be considered a waiver of any of Omega's claims against Res-Care or the Commonwealth of Kentucky, including but not limited to the claim that Res-Care or the Commonwealth of Kentucky may be liable to Omega as a result of improperly inducing residents, directly or indirectly, to vacate the Excepticon facility.

5. It is the stated intention of Omega to continue to operate the Excepticon facility after the holdover period, through a lease with a successor operator, as an ICF/MR facility for the care of 180 Medicaid funded residents. Nothing in this Agreed Order shall be considered to be a waiver or abandonment by Omega of that intent, or of such rights as it may possess to do so.

6. Res-Care shall not use its holdover position to impair Omega's ability to continue to operate Excepticon as a Medicaid-funded ICF/MR facility.

7. This Agreed Order shall be not construed as consent by Omega to any action of Res-Care or as a determination or waiver of any party's rights or claims or defenses.

8. During the holdover period, Omega shall have the same fights of access to the facility as exists under the expired Lease Agreement, but in addition to or as clarification of such rights, Omega has the right to visit and inspect the physical facility at any time during normal business hours. Any Omega representatives visiting the facility shall be required to go immediately to the Excepticon office and advise the individual in charge of their presence. If more than three individual representatives of Omega wish access to the facility at the same time, Res-Care shall be given 24 hours notice of the visit, the number of individuals involved, and the purpose for such visit. Res, Care may designate an employee or representative to accompany the Omega representatives on any visit or inspection. Omega representatives shall comply with any reasonable accommodations requested by Res-Care's office as may be necessary to avoid unnecessary disruption of the operations of the facility.

9. Res-Care shall permit Omega access to and review of operating and business records of the facility during the holdover period as may reasonably be requested for the purpose of the anticipated transition of the facility from Res-Care to Omega or Omega's designee. This provision specifically excludes individual patient medical records, unless such disclosure is allowed by controlling governmental statutes and regulations.

10. Res-Care shall simultaneously provide copies to Plaintiff of all court or governmental agency filings and correspondence relating to the operation, licensing or Medicaid funding status of the Excepticon facility, including both filings and correspondence from Res-Care and filings and correspondence received by Res-Care.

11. Notwithstanding any established document retention policies, no documents or records relating to the Excepticon facility or its operation shall be purged or destroyed during the pendency of this litigation.

12. Res-Care, Inc. (including its subsidiaries, assignees, contractors, or affiliates) agrees that it is the entity responsible for carrying out the provisions of this Agreed Order, and is the responsible party under the Lease Agreement for the Excepticon facility.

13. The existing Agreed Preliminary Order shall remain in full force and effect with regard to the "Current Facilities" located in Indiana as described in the Complaint, except as expressly modified by the provisions of this Agreed Order.

14. Res-Care confirms that it has exercised its purchase option on all of the "Current Facilities" located in Indiana, as described in the Complaint, all of which currently remain in Res-Cafe's possession and control pending completion of the contractual requirements for the transfer of ownership.

DATED this 26 day of October, 1999.

(Stamp)
JUDGE, UNITED STATES DISTRICT COURT

OMEGA HEALTHCARE INVESTORS, INC.

BY:_____
James R. Fisher, Atty No. 6847-49
Michael A. Wukmer, Atty No., 2223-49
Attorneys for Plaintiff

RES-CARE HEALTH SERVICES, INC. and
COMMUNITY ALTERNATIVES, INC.

BY:_____
David Tachau
William C. Potter, II, Atty No. 6284-49
Attorneys for Defendants

APPENDIX H

LEASE AGREEMENT

THIS LEASE, made this 4 day of August, 1989, by and between ANGELL REAL ESTATE COMPANY, a corporation organized and existing under the laws of the State of Delaware, having its principal office and place of business at 915 West Fourth Street, Winston-Salem, North Carolina, and its mailing address at Post Office Box 48, Winston-Salem, North Carolina 27102 (hereinafter referred to as the "Lessor"), and Robert E. Petrie his principal office and place of business at 707 Highland Way, Bowling Green, Kentucky 42101 (hereinafter referred to as the "Lessee").

W I T N E S S E T H :

WHEREAS, Lessor owns that certain health care facility (herein a "Facility") identified in Item 1 of Exhibit A attached hereto and made a part hereof; and

WHEREAS, Lessor desires to lease to Lessee, and Lessee desires to lease from Lessor, the real and chattel property of the Facility;

NOW, THEREFORE, in consideration of the premises and of their mutual undertakings, the parties hereto agree as follows:

1. Lease of Real and Chattel Property. Lessor, in consideration of the rents hereinafter reserved, and the terms, covenants, conditions and agreements set forth herein to be

kept and performed by Lessee, does hereby agree to demise and let unto Lessee and Lessee does hereby agree to hire and take from Lessor, the following described assets, rights, interests and other properties owned by Lessor and relating to the Facility (herein the "Demised Premises") :

(a) Land: The parcels of land more particularly described in Item 2 of Exhibit A (herein "Parcel");

(b) Improvements: All buildings, structures, fixtures and improvements erected or located on the Parcel, or affixed thereto (herein the "Improvements");

(c) Appurtenances: All tenements, hereditaments, rights, privileges, interests, easements and appurtenances belonging or in any wise pertaining to the Parcel and/or the Improvements; and

(d) Tangible Personal Property: All machinery and equipment, building material, appliances, apparatus, motor vehicles, furniture, furnishings, fixtures, tools instruments, parts, and other tangible personal property of every kind or nature whatsoever, owned, being purchased on contract or being leased by Lessor as of the date hereof, and located at or relating to the Facility, other than inventories (collectively herein the "Tangibles"); such tangible personal property on the effective date hereof shall include, but not be limited to, any and all items identified in the attached Exhibit B which is made a part hereof and incorporated herein by reference.

TO HAVE AND TO HOLD the Demised Premises unto Lessee, its successors and permitted assings, upon and subject to all of the terms, covenants, conditions, conditional limitations and agreements herein contained, for a term

commencing on September 1, 1989 (herein the "Commencement Date") and expiring on August 31, 1999, or until said term is sooner terminated pursuant to any of the conditional limitations or other provisions hereof. For purposes hereof, the term "Lease Year" means a period of one (1) year (herein the "Term") commencing on the Commencement Date or the annual anniversary date thereof.

The Lessee shall have the right to extend the Term for an additional (10) ten years (the "Additional Term"). The Lessee must exercise said option to extend in writing no later than-six (6) months prior to the expiration of Term. No such exercise shall be valid unless the Lessee, at all times, has complied with the terms and conditions of this Lease.

2. Title to Demised Premises. The Demised Premises shall be demised and let by Lessor unto Lessee free and clear of any and all liens, leases, mortgages, pledges, security interests, conditional, sale agreements, charges, claims, options, and other encumbrances of any kind or nature whatsoever (collectively "Encumbrances"), except the following (collectively the "Permitted Encumbrances"):

(a) Zoning Laws: The provisions of all applicable zoning laws;

(b) Taxes: The liens of current real estate and personal property taxes not delinquent; and

(c) Other Existing Encumbrances: The other existing Encumbrances set forth in Item 3 of Exhibit A.

3. Rent. Lessee shall pay to Lessor rent for the Demised Premises (herein "Minimum Rent") an initial annual amount of Two Hundred Seventy Two Thousand, Two Hundred Fifty

Two Dollars ($272,252.00), in equal monthly installments of Twenty Two Thousand Six Hundred Eighty Seven and 66/100 Dollars ($22,687.66) in advance on the first (1st) day of each calendar month during the term hereof (provided, however, that if the term hereof is terminated on a day other than the last day of a calendar month, then the Rent for such partial last month shall be prorated on the basis of the number of days since the last day of the preceding calendar month this Lease was in effect in relation to the total number of days in such period), without set-off or abatement.

4. Additional Rent.

(a) Commencing on January 1st, 1991, and thereafter, payable throughout the balance of the Term and the Additional Term (if applicable), Lessee shall pay quarterly to Lessor, in addition to the Minimum Rent, an additional rent in the manner set forth below, (herein the "Additional Rent") (Additional Rent and Minimum Rent herein collectively referred to as "Rent");

(b) Additional Rent to be paid hereunder shall be calculated as follows:

(1) Additional Rent for any Fiscal Year shall equal one-half (1/2) of a sum of money which shall be the amount, if any, in excess of the Minimum Rent, of the product determined by multiplying the Minimum Rent by a fraction, the numerator of which is the Cost of Living Index at the end of the Fiscal Year immediately preceding the Fiscal Year for which the Additional Rent is to be paid and the denominator of which is the

Cost of Living Index in effect on the Commencement Date of this Lease; provided, however that the payment of Additional Rent shall be subject to the provisions of Paragraph 4(b) [2) below.

(2) Notwithstanding the provisions of Paragraph 4(b)(i) above, the amount of Additional Rent for any Fiscal Year shall in no event exceed an amount which shall be equivalent to the product derived by multiplying by the number .03 the aggregate sum of all Minimum and Additional Rents paid or payable under this Lease for the Fiscal Year immediately preceding the Fiscal Year for which the Additional Rent in question is to be paid.

(c) After Fiscal Year 1990 has been established, Lessee shall calculate and pay in the manner set forth below Lessee's good faith estimate Of Additional Rent (the "Tentative Additional Rent") quarterly in the amount calculated in accordance with the above provision for the applicable portion of the current Fiscal Year, on a cumulative basis, up to the end of the fiscal quarter then most recently ended. Lessee shall thus calculate the amount of Additional Rent after the end of such quarter, including the final quarter of each Fiscal Year. If the Cost of Living Index to be applied for the then-current Fiscal Year is not yet available at the end of any such quarter, Lessee shall use the more recent available Cost of Living Index. Such Additional Rent shall be delivered to Lessor, together with a certificate issued by an officer or partner of Lessee setting forth the calculation thereof, within forty (40) days after the end of each fiscal quarter.

Lessee shall then proceed to calculate, within ninety (90) days after the end of each Fiscal Year, the actual Additional Rent actually due and payable to Lessor for the entire Fiscal Year then ended, and shall notify Lessor thereof, together with an Officer's Certificate setting forth the calculation thereof.

If such actual Additional Rent [as calculated by Lessee within such ninety (90) day period) exceeds the sum of the quarterly payments of Tentative Additional Rent previously paid by Lessee with respect to said Fiscal Year, Lessee shall forthwith pay such excess to Lessor. If the Additional Rent for said Fiscal Year as so determined is less than the amount previously paid with respect thereto by Lessee to Lessor, as Tentative Additional Rent, Lessor shall, at Lessee's option, either (i) forthwith remit to Lessee its certified or cashier's check in an amount equal to such difference, or (ii) grant Lessee a credit in such amount against the quarterly payment of Tentative Additional Rent next coming due.

Any difference between the annual Additional Rent as so determined and the total amount of quarterly payments of Tentative Additional Rent for such Fiscal Year previously paid by Lessee, whether in favor-of Lessor or Lessee, shall bear interest at NCNB National Bank of North Carolina's Prime Rate until the amount of such difference shall be paid or otherwise discharged.

As soon as practicable after the expiration or earlier termination of the Term, a final reconciliation shall be made, taking into account all relevant adjustments; provided that if a final reconciliation has not been made within one (1) year of such expiration or earlier termination, then a final reconciliation shall be made at

that time based on any available relevant information, including Lessee's good faith best estimate of the amount of any unresolved contractual allowances. The agreements of Lessee and Lessor set forth herein regarding such reconciliation shall survive such expiration or earlier termination of this Lease.

(d) For purposes of this Lease, the following terms shall have the following definitions:

(1) Cost of Living Index: The Consumer Price Index, Urban Wage Earnings and Clerical Workers, All Items, base 1967 equals 100, published by the Bureau of Labor Statistics, U.S. Department of Labor, or if said index is not available for the United States, then an available index for the geographical area within the United States nearest in size to the entire United States, published by said Bureau or its successor, or if none, by any other instrumentality of the United States or of the State of Kentucky, in the order mentioned.

(2) Fiscal Year: The twelve (12) month period from January 1st to December 31st [herein a "Fiscal Year").

5. Mortgages. Lessor may subject its interests in the Demised Premises to the liens of mortgages thereon, and this Lease shall be subordinate to any mortgage on Lessor's interest in the Demised Premises (herein a "Fee Mortgage"). During the term hereof Lessor-shall punctually (i) make all payments required to be made under any Fee Mortgage, and (ii) fulfill, all other obligations required to be fulfilled by the mortgagor under any Fee Mortgage. Lessee agrees to comply, at all times, with any and all non-monetary requirements of the holder of any Fee Mortgage.

6. Taxes. Lessee shall, at its cost and expense, bear, pay and discharge, on or before the last day upon which the same may be paid without interest or penalty for late payment thereof, all taxes, assessments, sewer rents, water rents and charges, duties, impositions, license and permit fees, charges for public utilities of any kind, payments and other charges of every kind or nature whatsoever, ordinary or extraordinary, foreseen or unforeseen, general or special (collectively herein "Impositions."), which shall, pursuant to present or future law or otherwise, prior to or during the term hereof, have been or be levied, charged, assessed or imposed upon, or grow or become due and payable out of or for, or become or have become a lien on, the Demised Premises or any part thereof, or the rents and income received by Lessor hereunder or received by Lessee from subtenants of the Demised Premises or of any part thereof, or any use or occupation of the Demised Premises; it being the intention of the parties hereto that the rents reserved herein shall be received and enjoyed by Lessor as a net sum free from all Impositions, except income taxes assessed against Lessor, franchise, estate, succession, inheritance or transfer taxes of Lessor, or any tax or charge in replacement or substitution of the foregoing or of a similar character, provided, however, that if at any time during the term hereof the then-prevailing method of taxation or assessment shall be changed so that the whole or any part of the Impositions theretofore payable by Lessee as above provided shall be increased by reason of rents or income received by Lessor from property other than the Demised Premises, then Lessee shall be obligated to pay only such proportion of such Impositions as shall be just and fair in the circumstances then prevailing. Lessee agrees to pay in advance any such Impositions if the holder of any Fee Mortgage requires that Lessor escrow or deposit such Impositions.

Lessee shall use its best efforts to cause the Demised Premises to be assessed and taxed separate and apart from all other premises. If, however, any Imposition payable by Lessee as aforesaid shall also be levied, charged, assessed or imposed upon, or grow or become due and payable out of or for, or become a lien on, or be based upon the value of, any other premises not constituting a part of the Demised Premises, then Lessee shall pay or cause to be paid the full amount of said Imposition, notwithstanding that all or a portion thereof is allocable to such other premises, but Lessee reserves all rights which Lessee may have, whether pursuant to law or agreement or otherwise, to recover all or a portion of said Imposition from the owner or owners of such other premises.

Lessee shall pay all interest and penalties imposed upon the late payment of any Imposition which Lessee is obligated to pay hereunder. Impositions shall be apportioned between Lessor and Lessee at the commencement, and as of the date of expiration or termination, of the term hereof on an accrual basis.

Lessee may take the benefit of the provisions of any law or regulation permitting any Imposition to be paid in installments, and the amounts of all installments of such Imposition which become due and payable after the expiration or termination of the term hereof shall be paid by Lessor.

If Lessee shall fail, for ten (10) days after notice and demand given to Lessee, to pay any Imposition on or before the last day upon which the same made be paid without the imposition of interest or penalties for the late payment

thereof, then Lessor may pay the same with all interest and penalties lawfully imposed upon the late payment thereof, and the amounts so paid by Lessor shall thereupon be and become immediately due and payable by Lessee to Lessor hereunder.

So long as Lessee is not in default hereunder, Lessee, at its own cost and expense may, if it shall in good faith so desire, contest the validity or amount of any Imposition, in which event Lessee may defer the payment thereof for such period as such contest shall be prosecuted actively and shall be pending undetermined; provided, however, that no provision hereof shall be construed so as to require Lessor to allow any such item so contested or intended to be contested to remain unpaid for such length of time as shall permit the Demised Premises, or the lien thereon created by such item to be contested, to be sold by federal, state, county or municipal authority for the nonpayment thereof.

An official certificate or statement issued or given by any sovereign or municipal authority, or any agency thereof, or any public utility, showing the existence of any Imposition, or interest or penalties thereon, the payment of which is the obligation of Lessee as herein provided, shall be prima facie evidence for all purposes hereof of the existence amount and validity of such Imposition.

7. Repair and Replacement. Lessee shall at all times during the term hereof, at its own cost and expense, keep the Demised Premises in good and reasonable operating condition and repair, and in such condition as may be required by law and by the terms of the insurance policies furnished pursuant to Paragraphs 15, 16 and 17 hereof; specifically including,

but not limited to, the replacement of any obsolete Tangibles, whether or not such repairs or replacements shall be interior or exterior, extraordinary or ordinary, and whether or not the same can be said to be within the present contemplation of the parties hereto.

The foregoing notwithstanding the Lessor and Lessee agree that the obligation of the Lessee to replace, as opposed to repair, any roof located on any building located on the Demised Premises shall be subject to the following limitations:

(a) Such time that Lessee determines that the roof of any building needs to be replaced, after 30 days written notice to Lessor, and subject to the reasonable approval of Lessor, the Lessee shall proceed with the replacement of such roof.

(b) The cost of such replacement shall be the Lessee's responsibility subject to the reimbursement provisions of said paragraph (c) below.

(c) Upon the termination of the Term, and subject to the Lessee having, at all times, fully complied with the terms and conditions of this Lease, the Lessor shall reimburse to the Lessee a portion of the unamortized cost of such roof replacement. Lessor's obligation for reimbursement shall be calculated as follows: the cost of such replacement less $10,000.00 times the percentage which is calculated by comparing the useful life of said replacement roof, at the time of replacement, compared to the remaining years left of such

useful life as of the termination of the term of this Agreement. Lessor' s reimbursement to Lessee shall be paid within sixty (60) days from the expiration date of the Term of this Lease.

(d) The purposes of this section "Useful Life" shall be determined based upon the length of warranty issued to Lessee by the manufacturer of the roof system so utilized. The cost of said roof shall be determined based on the estimate of cost of replacement submitted by Lessee to Lessor at the time the notice of replacement is provided. The notice of replacement shall include not only the anticipated cost of replacement but also the proposed roofing contractor, the roofing manufacturer and the plans and specifications for such replacement roof.

8. Compliance with Law. Lessee shall at all times during the term hereof, at its own cost and expense, substantially perform and comply with all laws, rules, orders, ordinances, regulations and requirements, now or hereafter enacted or promulgated, of every. government or municipality having jurisdiction over the Demised Premises, or franchises and privileges connected therewith, whether or not such laws, rules, orders, ordinances, regulations and requirements so involved shall necessitate structural changes, improvements, interference with use and enjoyment of the Demised Premises, replacements or repairs, extraordinary or ordinary, and Lessee shall so perform and comply whether or not such laws, rules, orders, ordinances, regulations and requirements shall now exist or shall hereafter be enacted or promulated, and whether or not such laws, rules, orders, ordinances, regulations and requirements can be said to be within the the present contemplation the parties hereto.

Lessee shall have the right, provided it does so with due diligence and dispatch, to contest by appropriate legal proceedings, without cost or expense to Lessor, the validity of any law, rule, order, ordinance, regulation or requirement of the nature referred to above. Lessee may postpone compliance with such law, rule, order, ordinance, regulation or requirement until the final determination of such proceedings so long as such postponement of compliance will not subject Lessor to any criminal prosecution. No provision hereof shall be construed so as to permit Lessee to postpone compliance with any such law, rule, order, ordinance, regulation or requirement if any sovereign, municipal or other governmental authority shall threaten to carry out or comply with the same or to foreclose or sell any lien affecting all or any part of the Demised Premises that shall have arisen by reason of such postponement or failure of compliance.

9. Alterations. Lessee shall not make any alterations or additions to the Demised Premises without Lessor's prior approval, which approval may be withheld in Lessor's sole and absolute discretion, except minor alterations or additions, and such alterations or additions necessary in the opinion of Lessee to maintain services to residents as provided in their admission agreements, to maintain licensure, or to maintain certification under the Medicaid or Medicare program.

10. Use of Demised Premises. Lessee shall use and occupy the Demised Premises solely for health care facilities.

Lessee shall not use or keep or allow the Demised Premises or any portion thereof to be used or occupied for any unlawful purpose and shall not suffer any act to be done or any condition to exist within the Demised Premises or any portion thereof, or knowingly permit any article to be brought therein, which may be dangerous, unless safeguarded as

required by law, or which may, in law, constitute a nuisance, public or private, or which may make void or voidable any insurance in force with respect thereto.

11. Protection Against Claims by Public. During such period or periods of the term hereof as any portion of the Parcel shall be unenclosed by any walled structure, fence or gate, such portion shall be subject to such reasonable directions as Lessor may from time to time make or give to Lessee with respect to the maintenance and use thereof, for the purpose of Lessor's protection against possible claims of the public, as such. Lessee hereby acknowledges that Lessor does not hereby consent, expressly or by implication, to the unrestricted use or possession of the whole or any portion of the Demised Premises by the public, as such, and Lessee covenants and agrees that all such reasonable directions so given shall be deemed to be and become incorporated herein by reference and shall be fully and premptly performed and enforced by Lessee at its cost and expense. Lessee covenants that it shall not suffer of permit Lessor's title to any part of the Demised Premises to become impaired in any manner whatsoever by Lessee's failure to comply fully and promptly with such directions.

12. Independence of Demised Premises. Lessee shall not by act or omission permit any building or other improvement on premises not demised hereunder to rely on the Parcel or any part thereof or any interest therein to fulfill any municipal or governmental requirement, and no Improvement shall rely on any premises not demised hereunder or any interest therein to fulfill any governmental or municipal requirement. Lessee shall not by act or omission impair the integrity of the

Demised Premises as units separate and apart from all other premises. Any act or omission by Lessee which would result in a violation of any of the provisions of this Paragraph shall be void.

13. Mechanics' Liens. Notice is hereby given that Lessor shall not be liable for any work performed or to be performed on the Demised Premises for Lessee or any subtenant, or for any materials furnished or to be furnished at the Demised Premises for Lessee or any subtenant, and that no mechanic's or other lien for such work or materials shall attach to the reversionary or other interest of Lessor. If, in connection with any work being performed by Lessee or any subtenant, or in connection with any materials being furnished to Lessee or any subtenant, any mechanic's or other lien or charge shall be filed or made against the Demised Premises or any part thereof, or if any such lien or charge shall be filed or made against Lessor as owner, then Lessee, at its cost and expense, within thirty (30) days after such lien or charge shall have been filed or made, shall cause the same to be cancelled and discharged of record by payment-thereof or filing a bond or otherwise, and shall also defend any action, suit or proceeding which may be brought for the enforcement of such lien or charge, and shall pay any damages, costs and expenses, including reasonable attorneys, fees, suffered or incurred thereby by Lessor, and shall satisfy and discharge any judgment entered therein within thirty (30) days from the entering of such judgment by payment thereof, or by filing of a bond, or by furnishing to Lessor an unconditional letter of credit issued by a bank and in an amount reasonably acceptable to Lessor, or otherwise. In the event of the failure of Lessee to discharge within such thirty (30) day period any lien, charge or judgment herein required to be paid or discharged by Lessee, Lessor may pay such item or discharge such liability by payment or bond or both, and Lessee shall

repay to Lessor, upon demand, any and all amounts paid by Lessor therefor, or by reason of any liability on any such bond, and also any and all incidental expenses, including reasonable attorneys' fees, incurred by Lessor in connection therewith.

14. Net Lease. This is an absolute net lease and Lessor shall not be required to provide any services or do any act or thing with respect to the Demised Premises except as otherwise specifically provided herein and the rent reserved herein shall be paid to Lessor without any claim on the part of Lessee for diminution, setoff or abatement, and nothing shall suspend, abate or reduce any rent to be paid hereunder except as otherwise specifically provided herein.

15. Liability Insurance. At all times during the term hereof, Lessee shall, at its own cost and expense, provide and keep in force policies as follows:

(a) Comprehensive general public liability insurance including without limitation upon the generality of the provisions of this Paragraph, elevator and boiler risks, protecting Lessor and Lessee against accident or disaster in or about the Demised Premises with limits not less than Five Million Dollars ($5,000,000.00) combined single limit for bodily injury (including death) and Two Million Dollars ($2,000,000.00) for property damage;

(b) Comprehensive automobile liability insurance, with limits not less than Five Million Dollars ($5,000,000.00);

(c) Professional liability insurance, with limits not less than Three Million Dollars ($3,000,000.00); and

(d) Workers' compensation insurance, with limits not less than those required by law.

Certificates evidencing all such policies of insurance shall be delivered to Lessor. Such policies of insurance, as well as any policies of insurance to be obtained by Lessee pursuant to Paragraphs 16 and 17 hereof, shall be issued by companies having a Best's rating of "A" or better. Such insurance coverage, as well as any insurance to be obtained by Lessee pursuant to Paragraphs 16 and 17 hereof, may be effected pursuant to a combination of primary and excess coverage insurance policies. Such insurance coverages may also be effected pursuant to blanket coverage insurance policies which cover losses in addition to those required to be insured against hereunder; provided, however, that the amount of coverage for the losses required to be insured against hereunder shall be separately stated, either in such blanket coverage policies or in a separate certificate issued by the insurer; provided, further, that such insurance gives to Lessor no less protection than that which would be afforded by separate policies; and provided, further, that Lessee delivers to Lessor certificates evidencing such insurance coverage.

If at any time Lessee shall neglect or fail, for five (5) days after notice and demand given to Lessee, so to provide and keep in force insurance policies as aforesaid, or indemnity insurance policies pursuant to Paragraph 16 hereof or fire or other casualty insurance policies pursuant to Paragraph 17 hereof, or so to deliver to Lessor certificates evidencing any of such policies of insurance, as required by the provisions hereof, Lessor may effect such insurance as the agent of Lessee, by taking out a policy or policies in a company or companies satisfactory to Lessor, running for a period not exceeding one (1) year under any one (1) policy; and the amount of premium paid for such insurance, by Lessor shall

be paid by Lessee to Lessor upon demand; and Lessor shall not be limited in the proof of any damages which Lessor may claim against Lessee arising out of or by reason of Lessee's failure to provide and keep in force general liability insurance policies as aforesaid to the amount of the insurance premium not paid or incurred by Lessee which would have been payable upon such insurance, but shall also be entitled to recover as damages for such breach the uninsured amount of any loss, liability, damage, claim, costs and expenses of suit, judgment and interest suffered or incurred by Lessor.

16. Indemnity. Lessee will indemnify and save harmless Lessor from and against any and all liability, loss, damages, expenses, costs of action, suits, interest, fines, penalties, claims and judgments (to the extent that the same are not paid out of the proceeds of any policy of insurance furnished by Lessee to Lessor pursuant to Paragraph 15 hereof) arising from injury, or claim of injury, during the term hereof to person or property of any and every nature, and from any matter or thing, growing out of the occupation, possession, use, management, alteration, repair, maintenance or control of the Demised Premises, or the franchises and privileges connected therewith, or arising out of Lessee's failure to perform, fully and promptly, or Lessee's postponement of compliance with, each and every term, covenant, condition and agreement herein provided to be performed by Lessee, excepting liability of Lessor for Lessor's negligence and willful misconduct. Except as hereinbefore provided, Lessee, at its own cost and expense, will defend by counsel any and all suits that may be brought, and claims which may be made, against Lessor, or in which Lessor may be impleaded with others, whether Lessor shall be liable or not, in respect of any such injury or claim of injury during the Term hereof growing out of the occupation, possession, use, management, alteration, repair, maintenance or control of the Demised

Premises, and Lessee shall satisfy, pay and discharge any and all judgments that maybe recovered against Lessor in any such action in which Lessor may be a party defendant, or that may be filed against the Demised Premises or any interest therein, and in the event of the failure of Lessee, for ten (10) days after notice and demand given to Lessee, to pay any such sum for which Lessee shall become liable as aforesaid, then Lessor may pay such sum, with all interest and charges which may have accrued thereon, and the amount so paid by Lessor shall be payable by Lessee to Lessor upon demand.

At all times during the term hereof, Lessee shall, at its own cost and expense, provide and keep in force a policy or policies of insurance (which may be effected by blanket coverage insurance as provided in Paragraph 15 hereof) insuring Lessee against all liability of Lessee under this Paragraph 16, which such policy or policies shall provide for the payment of any proceeds thereof directly to Lessor. Certificates evidencing all such policies of insurance shall be delivered to Lessor. If at any time or times Lessee shall neglect or fail, for five (5) days after notice and demand given to Lessee, so to provide and keep in force insurance policies as aforesaid, or so to deliver to Lessor certificates evidencing any of such policies of insurance, as required by the provisions hereof, Lessor shall have all rights set forth in Paragraph 15 hereof.

Notwithstanding the foregoing or any other provision of this Lease, it is expressly agreed that Lessee shall neither bear nor assume any liability, nor shall Lessee be held responsible to indemnify or hold Lessor harmless, with respect to any injury or claim of injury to person or property of any and every nature, and from any matter or thing, growing out of the occupation, possession, use, management, alteration, repair, maintenance or control of the Demised Premises by

any party other than Lessee prior to the effective date of this Lease, including but not limited to tax assessments attributable to prior periods, Medicare/Medicaid disallowances or refunds arising out of the previous operation of the Demised Premises, or legal claims attributable to occurrences which precede the effective date of this Lease. With respect to any and all such injuries, claims or potential claims attributable to matters or events which existed or occurred prior to the effective date of this Lease, Lessor will indemnify Lessee in full and hold Lessee harmless and, at its own cost and expense, will defend by counsel any and all suits which may be brought and claims which may be made against Lessee or in which Lessee may be impleaded with others, in respect of any such injury or claim, and shall satisfy, pay and discharge any and all judgments that may be recovered against Lessee in any such action in which Lessee may be made a party defendant, or that may be filed against the Demised Premises or any interest therein, and in the event of the failure of Lessor, for ten (10) days after notice and demand given to Lessor, to pay any such sum for which Lessor shall become liable as aforesaid, then Lessee may pay such sum, with all interest and charges which may have accrued thereon, and the amount so paid by Lessee shall be deductible from any subsequent Minimum and/or Additional Rent payments to be paid hereunder.

17. Hazard Insurance. At all times during the term hereof, Lessee shall, at its own cost and expense, keep:

(a) The Demised Premises insured against loss or damage by fire, lightning, windstorm, hail, explosion, riot, damage from aircraft, smoke damage, sprinkler leakage damage, war damage (when available) and such other insurance risks, casualties and hazards asare insured against by owners of comparable premises in an amount equal to

ninety percent (90%) of the replacement cost thereof, said replacement cost to be determined, on Lessor's request not more frequently than at annual intervals, by one or more of the insurers, or by an architect, contractor, appraiser or appraisal company selected by Lessee. Any of the Demised Premises located in special flood hazard areas insured against loss or damage by flood, in an amount equal to the maximum amount of insurance obtainable under the federal flood insurance program; and

(b) In addition, Lessee shall, at its own cost and expense, keep the net rental value of the Demised Premises insured against loss or damage by fire, lightning, windstorm, hail, explosion, riot, damage from aircraft, smoke, damage, war damage (when available) and such other insurance risks, casualties and hazards as are insured against by owners of comparable premises, in an amount equal to twice the sum of the following amounts: (i) all Rent payable by Lessee under Paragraphs 3 and 4 hereof for the ensuing twelve (12) month period, plus (ii) all Impositions payable by Lessee under Paragraph 6 hereof for the ensuing twelve (12) month period (if the amount of any such Imposition shall not have been fixed, then the same may be estimated based upon the tax rate for the preceding period and/or upon such other factors as are relevant, plus (iii) the cost of obtaining, for a one (1) year period, all insurance then required to be maintained by Lessee hereunder.

All insurance to be furnished by Lessee under this Paragraph 17 shall be by policies which shall name as insureds Lessor, Lessee, and any fee or leasehold mortgagee, as their interests may appear, shall provide a minimum cancellation provision of sixty (60) days after notice to all parties, shall not contain a deductible in excess of $2,500, and

shall provide that the loss, if any, shall be payable to Lessee. Such policies may be blanket coverage insurance policies as provided in Paragraph 15 hereof. In the event that, by reason of subordination of this Lease to any Fee Mortgage, any such insurance proceeds are net paid to or received by Lessee, then Lessee, at Lessee's Option, may elect to terminate this Lease by giving ten (10) days notice in writing to Lessor, electing to terminate this Lease, and the term hereof shall expire by limitation at the expiration of said ten (i0) days notice as fully and completely as if said date were the date herein originally fixed for the expiration of the term hereof. All such insurance proceeds received by Lessee (other than rent insurance proceeds, for which provision is made in Paragraph 18 hereof) shall be available for application to the cost of demolition, restoration, repair, replacement and rebuilding of the damage which occasioned the payment of such proceeds. Certificates evidencing all such policies of insurance shall be delivered to Lessor. Lessee, on request of Lessor, will deliver to Lessor an additional executed certificate of insurance for the holder of a first Fee Mortgage, if there be such holder.

If at any time Lessee shall, for five (5) days after notice and demand given to Lessee, neglect to insure the Demised Premises and rental value as aforesaid, or to deliver such certificates of insurance as aforesaid, Lessor shall have all of the rights set forth in Paragraph 15 hereof.

Lessee shall comply with the terms of each insurance policy required by the terms hereof to be furnished by Lessee.

18. Fire and- Other Casualty. If any Improvement or any Tangible shall be damaged or destroyed by fire or other casualty, then, irrespective of the cause and whether or not such damage or destruction shall have been insured, Lessee shall give prompt written notice thereof to Lessor, and shall

proceed with reasonable diligence to carry out any necessary demolition and to restore, repair, replace and rebuild such Improvements or Tangibles at Lessee's own cost and expense. If any insurance proceeds shall have been paid by reason of such damage or destruction, Lessee shall be entitled to such proceeds. If at any time Lessee shall fail or neglect to supply sufficient workmen or sufficient materials of proper quality, or fail in any othen respect to prosecute such work of demolition, restoration, repair, replacement or rebuilding with diligence and promptness, then Lessor may give Lessee notice of such failure or neglect, and, if such failure or neglect continues for twenty (20) days after such notice, then Lessor, in addition to all other rights which Lessor may have, may enter upon the "Demised Premises, provide labor and/or materials, cause the performance of any contract, and/or do such other acts and things as Lessor may deem advisable to prosecute such work. All costs and expenses incurred by Lessor in carrying out such work shall be borne by Lessee and shall be payable by Lessee to Lessor upon demand, which demand may be made by Lessor from time to time as such costs and expenses are incurred, in addition to any and all damages to which Lessor shall be entitled hereunder.

Rent shall not abate hereunder by reason of any damage to or destruction of the Demised Premises, and Lessee shall continue to perform and fulfill all of its obligations, covenants and agreements hereunder notwithstanding any such damage or destruction. Any loss of rent insurance proceeds received by Lessee by reason of such damage or destruction shall be applied by Lessee to the payment of Rent payable by Lessee under Paragraphs 3 and 4 hereof, Impositions payable by Lessee under Paragraph 6 hereof and premiums for any insurance required to be maintained by Lessee hereunder, but this shall not relieve Lessee of its obligations to pay punctually all such Rent, debt service, Impositions and

insurance premiums in the event rent insurance proceeds received by Lessee are insufficient to pay the same or for any reason such rent insurance proceeds are not actually applied by Lessee to the payment of such amounts. If and when Lessee shall complete all demolition, restoration, repair, replacement and rebuilding which Lessee is required to carry out under this Paragraph, then any balance of insurance proceeds then held by Lessee shall be retained by Lessee free of trust.

19. Condemnation.

(a) Entire Condemnation. If at any time during the term hereof all or substantially all of the Parcel and the Improvements shall be taken in the exercise of the power of eminent domain by any sovereign, municipality or other public or private authority, then this Lease shall terminate on the date of taking of possession by such authority. Substantially all of the Parcel and the Improvements shall be deemed to have been taken if the remaining Improvements cannot feasibly be repaired and restored so that they shall constitute a complete structural unit or units which can be operated as a healthcare facility on an economically feasible basis under the provisions hereof. The award or awards for any such taking of all or substantially all of the Parcel and the Improvements shall be paid to the Lessor.

(b) Partial Condemnation. If less than all or substantially all of the Parcel and the Improvements shall be taken in the exercise of the power; of eminent domain by any sovereign, municipality or other public or private authority, then this Lease shall continue in force and effect and Lessee shall proceed with reasonable diligence to carry out any necessary repair and restoration so that

the remaining Improvements shall constitute a complete structural unit or units which can be operated as a healthcare facility on an economically feasible basis under the provisions hereof. If Lessee shall fail or neglect to supply sufficient workmen or Sufficient materials of proper quality, or shall fail in any other respect to prosecute, such work of repair or restoration with diligence and promptness, then Lessor may give Lessee written notice of such failure or neglect, and, if such failure or neglect continues for twenty (20) days after such notice, then Lessor, in addition to all rights which Lessor may have, may enter upon the Demised Premises, provide labor and/or materials, cause the performance of any contract, and/or do such other acts and things as Lessor may deem advisable to prosecute such work. All costs and expenses incurred by Lessor in carrying out such work shall be borne by Lessee and shall be payable by Lessee to Lessor upon demand, which demand may be made by Lessor from time to time as such costs and expenses are incurred, in addition to any and all damages to which Lessor may be entitled hereunder.

The award(s) for any such partial taking shall be divided and paid to Lessor; provided, however, that Lessor shall make the same available to Lessee to pay the cost of any necessary repair and restoration work required of Lessee hereunder.

The Rent shall, as of the date of taking of possession by such authority, be decreased by an amount equal to that proportion of such Rent which the value of that portion so taken has to the value of the Facility, immediately prior to such taking. In the interim following the date of taking of possession by such authority until the time when the amount of the abatement of Rent shall be determined,

either by agreement of the parties or by litigation, the abatement of Rent shall be deemed to be equal to an amount bearing the same proportion to the Rent in effect immediately prior to such taking which the reduction in the number of beds necessitated by such taking bears to the total number of beds in use at the Facility, as so adjusted immediately prior to such taking. When the amount of the abatement is finally determined, the Rent for said interim period shall be recomputed and Lessee shall pay any deficiency to Lessor, or Lessor shall refund such excess to Lessee, as the case may be.

In the event that, by reason of subordination of this Lease to any Fee Mortgage, any such award for any such taking is not paid or made available to Lessee as hereinbefore provided, then Lessee, at Lessee's option, may elect to terminate this Lease by giving ten (10) days notice in writing to Lessor, electing to terminate this Lease, and the term hereof shall expire by limitation at the expiration of said ten (10) days notice as fully and completely as if said date were the date herein originally fixed for the expiration of the term hereof.

(c) Temporary Taking. If the temporary use of the whole or any part of the Parcel and the Improvements shall be taken at any time during the Term hereof in the exercise of the power of eminent domain by any sovereign, municipality or other authority, the Term hereof shall not be reduced or affected in any way and Lessee shall continue to pay in full the Rent and other sums of money and charges herein reserved and provided to be paid by Lessee, and the award for such taking shall be divided and

paid out in the following order of priority: First, there shall be paid to Lessee that portion of said award paid for use and occupancy of the Facility during the Term hereof, and second, the remainder, if any, of said award shall be paid to Lessor.

(d) Interest. Interest upon any award paid for a taking of the type referred to in Sections (a), (b) or (c) of this Paragraph 19 shall be divided and paid out to those persons entitled to the award upon which such interest shall have been paid, in proportion to the respective amounts received by such persons.

(e) Personal Property and Moving Expenses. Any award or part of an award paid as compensation for the taking of personal property owned by Lessee or a subtenant or for moving expenses of Lessee or a subtenant, shall be payable to Lessee or such subtenant, as the case may be.

20. Restoration after Fire or Condemnation. Whenever Lessee shall be required to carry out any work of demolition, restoration, repair, replacement or rebuilding pursuant to Paragraph 18 hereof or Section (b) of Paragraph 19 hereof, Lessee, prior to the commencement of such work, unless such work is of a minor nature, as that term is hereinafter defined):

(a) Lessee shall furnish Lessor complete plans and specifications for such work hearing the signed approval thereof by a licensed architect.

(b) Lessee shall furnish Lessor certified or photostatic copies of all permits and approvals required by law in connection with the commencement and conduct of such work.

Lessee shall not commence any of said demolition, restoration, repair, replacement or rebuilding work until Lessee shall have complied with the above requirements, and thereafter Lessee shall carry out such work diligently and in good faith in accordance with the plans and specifications referred to above.

If the above-mentioned work shall be of a minor nature, as that term is hereinafter defined, then the requirements set forth above in this Paragraph 20 shall not be applicable, except that Lessee shall obtain and furnish to Lessor all permits and approvals required by law in connection with the commencement and carrying out of such work. Such work shall be deemed to be of a minor nature only if in one continuous project the aggregate cost of such work is less than One Hundred Thousand Dollars ($100,000.00).

21. Assignment and Subletting. Lessee may not assign this Lease or any interest herein, or make any sublease of all or any part of the Demised Premises, without Lessor's prior written consent which consent shall not be unreasonably withheld or delayed, and any such attempted assignment or subletting without such prior written consent shall be void; provided, however, that such prior written consent shall not be required for (i) any assignment or sublease by Lessee to an affiliate of Lessee, (ii) any residency agreement or admission agreement with respect to the Facility made by Lessee in the ordinary course of its business, and/or (iii) any sublease of space in the Facility for any accessory use made by Lessee in the ordinary course of business. No consent by Lessor to any assignment or subletting shall be deemed or construed to relieve Lessee from obtaining the express written consent of Lessor to any further assignment or subletting.

For purposes hereof, the term "affiliate of Lessee" means a person controlling, controlled by or under common control with Lessee, and shall be deemed and construed to include, but not be limited to, a limited partnership of which Lessee or an affiliate of Lessee is a general partner, regardless, of the percentage of such general partner's beneficial interest in such limited partnership.

No acceptance by Lessor of any performance or rent herein provided to be done or paid by Lessee from any person other than Lessee shall discharge Lessee or any other person liable for performance of Lessee's obligations hereunder (except to the extent of the performance and payments so accepted by Lessor) from liability to pay all of the rent herein provided to be paid by Lessee or from liability to perform any of the terms, covenants conditions and agreements set forth herein.

All references herein to a sublease shall be deemed to include all arrangements for occupancy or other use by any person of all or any part of the Demised Premises, and all references herein to a subtenant shall include, any occupant or other use of all or any part of the Demised Premises.

In the event of a termination hereof, each subtenant of space within the Demised Premises shall attorn to the owner of the reversion, unless the owner of the reversion shall, at the owner's option, elect to dispossess such subtenant or otherwise terminate the sublease held by such subtenant. Each subtenant who hereafter subleases space within the Demised Premises shall be deemed to have agreed to the provisions of this Paragraph.

Lessee hereby assigns to Lessor the right, following any default by Lessee hereunder which is not cured by Lessee within any applicable cure period, to collect from any or all subtenants all rents and other Sums payable by them, and to apply the same to the payment of Rent and all other amounts payable by Lessee hereunder, and any balance shall be paid over to Lessee; but no exercise by Lessor of rights under this Paragraph shall be deemed a waiver by Lessor of any other rights hereunder or be deemed an acceptance by Lessor of such subtenant or an acquiescence by Lessor to the occupancy of any part of the Demised Premises by such Subtenant or a release of Lessee from the performance of any of the obligations of Lessee hereunder.

22. Bankruptcy. If at any time during the term hereof there shall be filed by or against Lessee in any court or other tribunal pursuant to any statute or other rule of law, either of the United States or of any state or of any other authority now or hereafter exercising jurisdiction, a petition in bankruptcy or insolvency proceedings or for reorganization or for the appointment of a receiver or trustee of all or substantially all of Lessee's property or if Lessee makes a general assignment for the benefit of creditors then, subject to the provisions of this Paragraph 22, this Lease may, at the option of Lessor to be exercised by thirty (30) days written notice to Lessee, be cancelled and terminated, and in that event neither Lessee nor any person claiming through or under Lessee by virtue of any statute or other rule or of an order of any court or other tribunal shall be entitled to possession or to remain in possession of the Demised Premises or any part thereof but shall forthwith quit and surrender the Demised Premises; provided however, that if any such petition shall be filed against Lessee and if in good faith Lessee shall promptly thereafter commence and diligently prosecute any and all proceedings appropriate to secure the dismissal of such

petition, Lessor's right to cancel and terminate this Lease by reason of the filing of such petition shall be suspended during such period as said proceedings for the dismissal of such petition shall continue. Any provision of this Paragraph 22 providing for the suspension of Lessor's right to cancel and terminate this Lease is intended only to suspend Lessor's right to cancel and terminate pursuant to this Paragraph 22, and shall not be deemed to suspend or otherwise restrict Lessor's right to cancel and terminate this Lease, in the event of a default by Lessee under any other paragraph hereof pursuant to Paragraph 24 hereof or otherwise.

In the event of the termination hereof pursuant to this Paragraph 22, Lessor shall forthwith at Lessor's option, notwithstanding any other provision hereof to the contrary, be entitled to recover from Lessee, in addition to any other proper claims for rent and other sums of money payable hereunder, as and for liquidated damages, a sum equal to the amount by which the Rent reserved under Paragraphs 3 and 4 hereof for the unexpired portion of the term hereof exceeds the net rental value of the Demised Premises at the time of such termination for the said unexpired portion of the term hereof, both discounted at the rate of eight percent (8%) per annum to their present worth. Nothing herein contained shall limit or prejudice the right of Lessor to prove for obtain as liquidated damages by reason of a termination hereof pursuant to this Paragraph 22 an amount equal to the maximum allowed by any statute or other rule of law in effect at the time when and governing the proceedings in which, such damages are to be proved, whether or not such amount be greater than, equal to or less than the amount of the damages referred to above.

23. Management Agreement. Lessor approves the entry by Lessee simultaneously with the execution of this Lease, into a Management Agreement (herein the "Management Agreement") of even date, with Res-Care Health Services Inc. (hereinafter referred to as "Manager") for the professional management of the Facility, a true and correct copy of which is attached hereto as Exhibit C_ and made a part hereof. Lessee agrees that it will not consent to any modification or amendment of the Management Agreement without the prior written approval of Lessor. Upon an uncured event of default, the parties acknowledge that Lessor may direct the Manager to proceed to perform under the terms of the Management Agreement dealing with Lessor as an assignee of Lessee, which rights shall include payment of all sums due under the Management Agreement.

24. Access to Project; Books, Records, Accounts and Annual Reports. Lessee shall keep and maintain or shall cause to be kept and maintained, at Lessee's cost and expense and in accordance with sound accounting practice, proper and accurate books, records and accounts reflecting all items of income and expense in connection with the operation of the Facility or in connection with any services, equipment or furnishing & provided in connection with the operation thereof. Lessor shall have the right, from time to time, to examine by Lessor's agents, accountants and attorneys employed at Lessor's expense, such books, records and accounts at the office either of Lessee or such other person or entity maintaining said books, records and accounts and to make copies or extracts thereof as Lessor shall desire and to discuss Lessee's affairs, finances and accounts with Lessee and with the officers and principals of Lessee at such reasonable times as may be requested by Lessor. Lessee will furnish to Lessor on or before April 1st of each year, for the preceding calendar year, a balance sheet, profit and loss

statement, and all supporting schedules covering operation of the Facility and the Lessee, all in reasonable detail, prepared in accordance with sound accounting practices and certified by the general partner or principal financial or accounting officer of Lessee; and Lessee will furnish to Lessor, at any time within thirty (30) days after demand by Lessor, statements certified by Lessee's principal financial or accounting officer covering such additional financial matters respecting the Facility and the Lessee as Lessor may reasonably request including, without limitation, quarterly operating statements with respect to the Facility and the Lessee.

25. Default; Termination. If at any time during the term hereof (i) Lessee shall default in the payment of any Rent or of any other sum of money whatsoever which Lessee shall be obligated to pay under the provisions hereof for three (3) days after written notice and demand, or (ii) Lessee shall default in the performance or observance of any of the other terms, covenants, conditions or agreements hereof for thirty (30) days after written notice and demand [or, if such default shall be of such a nature that the same cannot practicably be cured within said thirty (30) day period, Lessee shall not within said thirty (30) day period commence with due diligence and dispatch to cure and perform such defaulted term, covenant, condition or agreement, or Lessee shall within said thirty (30) day period commence with due diligence and dispatch to cure and perform such defaulted term, covenant, condition or agreement but shall thereafter fail or neglect to prosecute and complete with due diligence and dispatch the curing and performance of such defaulted term, covenant, condition or agreement], then and in any such case, if such default shall be continuing, Lessor, at Lessor's option, may elect to terminate this Lease at any time by giving ten (10) days notice in writing to Lessee, electing to terminate this Lease, and the

term hereof shall expire by limitation at-the expiration of said ten (10) days notice as fully and completely as if said date were the date herein originally fixed for the expiration of the term hereof, and Lessee shall thereupon quit and peacefully surrender the Demised Premises to Lessor, without any payment therefor by Lessor, and Lessor, upon the expiration of said ten (10) days notice, or at any time thereafter may re-enter and remove all persons and property therefrom, either by summary proceedings or by any suitable action or proceeding at law, or by force or otherwise, without being liable to indictment, prosecution or damages therefor, and may have, hold and enjoy the Demised Premises.

If Lessor shall obtain possession of the Demised Premises by reason of or following any default of Lessee, then Lessee shall pay to Lessor on demand all reasonable expenses, incurred by Lessor in obtaining possession and in altering, repairing and putting the Demised Premises in good order and condition, and in reletting the same including reasonable fees of architects, attorneys and agents, and any other reasonable expenses and commissions and Lessee further agrees to pay to Lessor upon the rent days specified herein in each month following any termination hereof by reason of a default of Lessee hereunder, until the end of the period which would have constituted the term hereof had this Lease not so, terminated, the Rent and all other sums of money whatsoever which would have been payable by Lessee during such period, deducting only the net amount of rent, if any, which Lessor shall actually receive after deducting there from all reasonable expenses and costs of operation and maintenance of the Demised Premises) in the meantime from and by any reletting of the Demised Premises, and Lessee hereby agrees to be and remain liable for all sums aforesaid as well as for any deficiency therein. Lessor shall have the right from time to time to bring and maintain successive actions or other legal

proceedings against Lessee for the recovery of such amounts, which liability it is expressly covenanted shall survive the issuance of any warrant of dispossess or other termination hereof. Nothing herein contained shall be deemed to require Lessor to wait to bring any such action or other legal proceedings until the date when this Lease would have expired had there been no such default by Lessee. In reletting the Demised Premises as aforesaid, Lessor may make leases and lettings of the whole or less than the whole of the same, for a term or terms greater or less than the term hereof, and for a rental or rentals and upon such terms, covenants, conditions, agreements and provisions as Lessor may reasonably elect.

No receipt of moneys by Lessor from Lessee after a termination hereof by Lessor shall reinstate, continue or extend the Term hereof or affect any notice theretofore given to Lessee, or operate as a waiver of the right of Lessor to enforce the payment of rent when due or thereafter falling due, it being agreed that after the commencement of suit for possession of the Demised Premises, or after final order or judgment for possession of the Demised Premises, Lessor may demand, receive and collect any moneys due or thereafter falling due without, in any manner affecting such suit, order or judgment; all such moneys collected being deemed payments on account of the use and occupation of. the Demised Premises or, at the election of Lessor, on account of Lessee's liability hereunder. Lessor shall have, receive and enjoy, as Lessor's sole and absolute property, any and all sums collected by Lessor as rent or otherwise upon reletting the Demised Premises after Lessor shall resume possession thereof as hereinbefore provided, including, without limitation upon the generality of the foregoing, any amounts by which the sum or sums collected exceed the continuing liability of Lessee hereunder.

The word "re-enter" as used herein is not and shall not be restricted to its technical legal meaning, but is used in the broadest sense.

The parties hereto agree that notwithstanding any other provision of this Lease, the term "default" as used in this Lease will also include (i) the termination, either voluntary or involuntary, of the Management Agreement; or (ii) the occurrence of an event of default by either party to the Management Agreement.

It is further agreed that notwithstanding any other provisiohs of this Lease, in the event that any repeal, amendment or other change to any Federal or State legislation and/or regulation governing or affecting the Federal Medicare program or the Federal Medicaid program becomes effective or is implemented during the Term whether or not resulting from any legislative, executive or judicial action, such that as a result, the reimbursement of Lessee under said provision(s) are reduced to the extent that Lessee makes a bonafide determination that such reduction will materially and adversely affect the economic feasibility of this Lease Agreement insofar as Lessee is concerned, then a good faith renegotiation of the terms and conditions hereof shall be conducted by the parties within thirty (30) days of receipt by Lessor of a written request from Lessee for such renegotiation which shall set forth Lessee's reasons for requesting said renegotiation.

26. Waiver of Rights of Redemption. If at any time hereafter Lessor shall obtain possession of the Demised Premises under legal proceedings or pursuant to the terms and conditions hereof or pursuant to present or future law, because of default by Lessee in observing or performing any term, covenant, condition or agreement hereof, all rights of

redemption provided by any law, statute or ordinance now in force or hereafter enacted shall be and are hereby waived by Lessee to the extent permitted by law.

27. Lessor's Right to Cure Lessee's Defaults. Whenever and as often as Lessee shall fail or neglect to comply with and perform any term, covenant, condition or agreement to be complied with or performed by Lessee hereunder, then, upon thirty (30) days prior written notice to Lessee (except where a shorter notice period is provided herein, in which event such shorter period shall apply), if such default shall be continuing, Lessor, at Lessor's option, in addition to all other remedies available to Lessor, may perform, or cause to be performed, such work, labor, services, acts or things, and take such other steps, including entry onto the Demised Premises as Lessor may reasonably deem advisable, to comply with and perform any such term, covenant, condition or agreement which is in default, in which event Lessee shall reimburse Lessor upon demand, and from time to time, for all reasonable costs and expenses suffered or incurred by Lessor in so complying with or performing such term, covenants, condition or agreement. The commencement of any work or the taking of any other steps or performance of any other act by Lessor pursuant to this paragraph shall not be deemed to obligate Lessor to complete the curing of any term, covenant, condition or agreement which is in default. Lessee hereby waives any claim and releases Lessor and Lessor's agents, contractors and employees from all liability for damage occasioned by any action taken by Lessor pursuant to this paragraph, excepting liability of Lessor for negligence and willful misconduct of Lessor and Lessor's agents, contractors and employees.

28. Injunction. Each party, at its option, in addition to any other rights reserved to it, and notwithstanding the concurrent pendency of other proceeds between Lessor and Lessee, shall have the right at all times during the term hereof to restrain by injunction any violation or attempted violation by the other party of any of the terms, covenants, conditions or agreements hereof, and to enforce by injunction any of the terms, covenants, conditions and agreements thereof.

29. No Merger. In no event shall the leasehold estate in the Demised Premises created hereby, or the rights of Lessee hereunder, or the rights of the holder of any Leasehold Mortgage, merge with any interest, estate or rights of Lessor in or to the Demised Premises, except by Lessor's written declaration of such merger, it being understood that such leasehold estate, rights of Lessee hereunder and rights of the holder of any Leasehold Mortgage shall be deemed to be separate and distinct from Lessor's interest, estate and rights in and to the Demised Premises, notwithstanding that any such interests, estates or rights shall at any time or times be held by or vested in the same person.

30. Definition of "Lessor" and "Lessee". The terms "Lessor" and "Lessee" as used herein shall at any given time mean the persons who are the owners of the reversionary estate of Lessor in and to the Demised Premises, and the leasehold estate of Lessee in and to the Demises Premises created herein, respectively. In the event of any conveyance or other divestiture of title to either such estate in and to the Demised Premises, the grantor or the person who is divested of title (the "Grantor") shall be entirely freed and relieved of all covenants and obligations thereafter accruing hereunder, and the grantee or the person who otherwise succeeds to title shall be deemed to have assumed the covenants and obligations of the Grantor hereafter accruing hereunder, and

until the next conveyance or divestiture of title the other party shall look solely to said grantee or successor for the observance and performance of the covenants and obligations of the Grantor hereunder so assumed by said grantee or successor. Lessee shall attorn to any such grantee or successor of Lessor. Any provision hereof to the contrary notwithstanding, no assignment by Lessee of this Lease or any interest herein to an affiliate of Lessee shall relieve or release Lessee of or from any of its liabilities or obligations hereunder.

31. Quiet Enjoyment. Lessor covenants that at all times during the term hereof, so long as Lessee is not in default hereunder, Lessee's quiet enjoyment of the Demised Premises or any part thereof shall not be disturbed by any act of Lessor, or of anyone acting by, through or under Lessor, except in respect of the Permitted Encumbrances.

32. Lessor's Right of Entry. Lessor and its authorized agents and employees shall have the right from time to time, at Lessor's option, and upon reasonable prior notice to Lessee, to enter and pass through the Demised Premises during business hours, to examine the same and to show them to prospective purchasers, fee mortgagees and others, but this shall not obligate Lessor to make any such entry or examination.

33. Estoppel Certificates. Each party shall at any time and from time to time during the term hereof, within ten (10) days after request by the other party, execute, acknowledge and deliver to the other party or to any prospective Purchaser, assignee or mortgagee designated by the other party, a certificate stating (i) than this Lease is unmodified and in force and effect (or, if there have been any modifications, that this Lease is in force and effect as modified and identifying

the modification agreements); (ii) the date to which Rent has been paid; (iii) whether or not there is any existing default by Lessee in the payment of Rent or any other sum of money hereunder, and whether or not there is any other existing default by either party with respect to which a notice of default has been served, and, if there is any such default, specifying the nature and extent thereof; and (iv) whether or not there are any setoffs, defenses or counterclaims against enforcement of the obligations to be performed hereunder existing in favor of the party executing such certificate.

34. Rights Cumulative. All the rights and remedies of each party hereunder or pursuant to present or future law shall be deemed to be separate, distinct and cumulative, and no one or more of them, whether exercised or not, nor any mention of or reference to any one or more of them herein, shall be deemed to be an exclusion or a waiver of any of the others, or of any of the rights or remedies which such party may have, whether by present or future law or pursuant hereto, and each party shall have, to the fullest extent permitted by law, the right to enforce any rights or remedies separately and to take any lawful action or proceedings to exercise or enforce any right or remedy without thereby waiving or being barred or estopped from exercising and enforcing any other rights and remedies by appropriate action or proceedings.

35. Payments of Money; Interest. All amounts whatsoever which Lessee shall be obligated to pay pursuant hereto shall be deemed rent, and in the event of the nonpayment by Lessee of any such of money whatsoever which Lessee from time to time shall be obligated to pay to Lessor under any provision hereof, Lessor shall have the same rights and remedies by reason of such nonpayment as if Lessee had failed to pay an installment of Rent under Paragraphs 3 and 4 hereof. Except as herein specifically stated otherwise, in each instance when

Lessee shall be obligated to make any payment of any sum of money whatsoever hereunder, interest shall accrue thereon and be payable hereunder at the rate of thirteen percent (13%) per annum computed from the date such payment first became due hereunder.

36. Surrender; Obligations Upon Expiration or Termination.

(a) Lessee shall, on the last day of the term hereof or upon any termination hereof, pursuant to Paragraph 22 or 23 hereof or upon any other termination hereof, well and truly surrender and deliver up the Demised Premises into the possession and use of Lessor without fraud or delay and in good order, condition and repair, ordinary wear and tear excepted, free and clear of all lettings and occupancies and free and clear of all encumbrances other than those existing on the date hereof and those, if any, created by Lessor without any payment or allowance whatever by Lessor.

(b) Within thirty (30) days after the expiration or termination of the term, hereof, Lessee shall deliver to Lessor or Lessor's managing agent all funds of residents of the Facility held in trust by Lessee.

(c) Lessee represents and warrants to Lessor that (except for changes in the ordinary course of business, and for all other changes unforeseen and/or uncontrollable by Lessee, occurring after the date hereof), to the extent feasible and consistent with ordinary business practices, Lessee will expend its best efforts such that upon the expiration or termination of the Term hereof, the

following statements will be (notwithstanding any investigation by Lessor of any matters described herein or related thereto) true statements of law and fact:

(1) All of the Inventories are at levels which are consistent with operations in the ordinary-course of business and, to the best of Lessee's knowledge after diligent investigation, are at levels which are consistent with all applicable regulatory requirements and are usable in the ordinary course of business.

(2) There is no outstanding written notice of default, cancellation or termination in connection with any instrument or document which could be construed, directly or indirectly, to bind or in any way affect Lessor or Lessor's assigns after the termination hereof; and, to the best of Lessee's knowledge after diligent investigation, (i) Lessee has performed all of its obligations under the terms and conditions thereof and is not in default thereunder, (ii) no event or omission has occurred which, but for the passing of time or the giving of notice, or both, would be a default by Lessee thereunder, and (iii) each thereof is valid, binding, and in full force and effect in accordance with its terms.

(3) Lessee is not a party to any written employment or consulting agreement, or written pension, profit-sharing, bonus, deferred compensation, retirement, stock option, medical health, disability, insurance, welfare or other employee benefit plan, arrangement, contract, agreement, program or policy relating to the Facilities (collectively, the "Benefit Plans") which would be binding upon or affect Lessor or any successor lessee after the date of expiration or

termination hereof; and, to the best of Lessee's knowledge after diligent investigation, (i) all of the Benefit Plans are in substantial compliance with all applicable laws, and (ii) Lessee has substantially complied with all reporting and disclosure requirements under all applicable laws and has administered and operated the Benefit Plans substantially in accordance with their provisions and all applicable laws.

(4) Lessee has paid all taxes, charges and assessments as and when due, has made all debt service payments when contractually due and payable, and has paid all accounts payable and other liabilities on a current basis.

(5) There is no disciplinary proceeding pending or; to the best of Lessee's knowledge after diligent investigation, threatened against any member of the Facility's medical staff.

(6) All costs, reimbursement and similar reports relating to the Facility have been filed when due as required for Medicaid and any third-party payor reimbursement.

(7) Lessee owns all intellectual property (specifically including, but not limited to, trademarks, trade names and service marks) material to the conduct of the business of the Facility; and Lessee has not infringed and is not infringing on, and has not engaged and is not engaging in the unauthorized use or

misappropriation of, any intellectual properly of another, and there is no actual or, to the best of Lessee's knowledge after diligent investigation, threatened claim or assertion against Lessee relating thereto.

(d) Lessee shall use its best efforts to persuade such personnel of the Facilities as Lessor may designate to become employees of Lessor or Lessor's assigns after the expiration or termination of the term hereof.

(e) Following the expiration or termination of the term hereof, Lessee shall pay all personnel of the Facility all benefits [specifically including, but not limited to, compensation for accrued and vested (in accordance with Lessee's personnel policies), but unpaid, vacation pay] normally payable upon termination of employment. If Lessee fails to make any such payment, Lessor shall have the right to cure such default and demand immediate, reimbursement from Lessee.

(f) Lessee shall permit Lessor to bill the appropriate payers under Lessee's provider numbers for all services rendered by Lessor in connection with Lessor's operation of the Facility during the period commencing with the day following the expiration or termination of the Term hereof and ending with the last day of the month immediately before the month in which Lessor receives notification of the issuance of Lessor's own provider numbers, and Lessee shall assist Lessor in making such billings; provided however, that Lessor shall indemnify and save Lessee harmless from and against any and all claims, demands actions, controversies, suits, liabilities, losses, damages, costs, charges, and reasonable attorneys' fees and other expenses [collectively, "Losses"), arising by

reason of or resulting from Lessor's improper use of Lessee's provider numbers. Lessee shall be entitled to any portion of the proceeds of billings under Lessee's provider numbers representing payment for services rendered on or before the date of such expiration or termination, and Lessor shall be entitled to that portion of the proceeds of such billings representing payment for services after the date of such expiration or termination. Lessee shall file all required final Medicaid and other cost reports when due and shall furnish copies of such reports so filed to Lessor; and if Lessee fails to file any such report when due, Lessor shall have the right to file such report on Lessee's behalf.

37. No Waiver. No failure on the part of either party at any time to require the performance by the other party of any term hereof shall be taken or held to be a waiver of such term or in any way affect such party's right to enforce such term, and no waiver on the part of either party of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof.

38. Severability. The invalidity or unenforceability of any particular provision hereof shall not affect the other provisions, and this Lease shall be construed in all respects as if such invalid or unenforceable provision had not been contained herein.

39. Benefit. This Lease shall inure to the benefit of and be binding upon the parties and their respective legal representatives, successors and assigns. The provisions hereof are solely for the benefit of the parties and their respective legal representatives, successors and assigns, and shall not be deemed or construed to create any rights for the benefit of any other person.

40. Construction. Whenever a singular word is used herein, it shall also include the plural wherever required by the context, and vice versa. The terms and conditions hereof represent the results of bargaining and negotiations between the parties, each of which has been represented by counsel of its selection, and neither of which has acted under duress or compulsion, whether legal, economic or other wise, and represent the results of a combined draftsmanship effort. Consequently, the terms and conditions hereof shall be interpreted and construed in accordance with their usual and customary meanings, and the parties hereby expressly waive and disclaim, in connection with the interpretation and construction hereof, any rule of law or procedure requiring otherwise, specifically including but not limited to, any rule of law to the effect that ambiguous or conflicting terms or conditions contained here in shall be interpreted or construed against the party whose counsel prepared this Lease or any earlier draft hereof.

41. Entire Agreement: Written Modifications. This Lease contains the entire understanding between the parties with respect to the subject matter hereof; all representations, promises, and prior or contemporaneous understanding, between the parties with respect to the subject matter hereof are merged into and expressed in this Lease; and any other understandings between the parties with respect to the subject matter hereof are hereby cancelled. This Lease shall not be amended, modified or supplemented without the written agreement of the parties at the time of such amendment, modification or supplement.

42. Governing Law. This Lease shall be governed by and subject to the laws of the State of Kentucky.

43. Captions. The captions herein are for convenience and identification purposes only, are not an integral part hereof, and are not to be considered in the interpretation of any part hereof.

44. Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if sent by certified or registered mail, return receipt request, postage prepaid, addressed as follows:

To Lessor: Angell Real Estate Company
Post Office Box 48
Winston-Salem, North Carolina 27102
Attention: William G. Benton, President

With a copy to: House & Blanco, P.A.
Post Office Drawer 25008
Winston-Salem, North Carolina 27114-5008
Attention: Ronald A. Matamoros, Esquire

To Lessee: Robert E. Petrie
707 Highland Way
Bowling Green, Kentucky 42101

or to such other address as shall be furnished in writing by either party to the other party.

45. Counterparts. This Lease may be executed in separate counterparts, each of which when so executed shall be an original, but all of such counterparts shall together constitute but one and the same instrument.

46. Costs of Enforcement. If any action is instituted in connection with any controversy arising out of this Lease, the prevailing party shall be entitled to recover, in addition to costs, such sum as the court may adjudge reasonable as attorneys fees in such action and on any appeal from any judgment or decree entered therein.

47. Purchase Option. The Lessee shall have the right to purchase the Demised Premise at the end of the Term. Such purchase option shall be subject to the following: terms and conditions:

(a) Lessee must exercise such option to purchase in writing no later than six (6) months prior to the expiration of the Term.

(b) No such exercise shall be valid unless the Lessee has, at all times, complied with the terms and conditions of this Lease.

(c) The purchase price for such option shall be the "Fair Market Value" as determined by an appraiser mutually agreeable to Lessor and Lessee. If Lessor and Lessee cannot agree on an appraiser each shall choose an appraiser. Those appraisers shall choose a 3rd appraiser with the Fair Market Value to be determined based on an average of the Fair Market Value as shown on each of the three appraisals. The Parties agree to equally share the appraisal costs.

(d) Closing shall occur within sixty (60) days after the expiration date of the term.

(e) The purchase price shall be paid in cash at closing with the Lessee paying all costs of closing except for the Lessor's attorneys fees.

IN WITNESS WHEREOF, the parties have executed this Lease as of the day and year first above written.

LESSOR:

ANGELL REAL ESTATE COMPANY

ATTEST:

By /s/Lisbeth C. Evans
President

By /s/Deborah Sams Kelseti
Asst. Secretary

(Corporate Seal)

LESSEE:

By /s/Robert E. Petrie by
Robert E. Petrie
Dorothy P.Lawson
P_O_

Exhibit A - 1

1. Identification of Facility:
   (a) Name: Lexington Campus
   (b) Address: 1321 Trent Boulevard Lexington, Kentucky 40502
2. Legal Description of Parcel:

TRACT NO. I. All of Tract #2, Unit #2, of River Park Subdivision to the City of Lexington, Fayette County, Kentucky, as shown on amended plat of record in Plat Book 24, page 3, in the Fayette County Court Clerk's Office.

TRACT NO. II. All of Parcel #1 as shown on consolidation plat of Excepticon, Inc., property of record in Plat Book 24, page 13, in the aforesaid Clerk's Office.

3. Other Existing Encumbrances:

(a) Lien agreement under KRS Chapter 107 relating to sanitary sewer construction between City of Lexington, et al., recorded on November 22, 1972, in Deed Book 1064, page 390, in the aforesaid Clerk's Office, and the liens created therein.

(b) Utility and water line easement 20 feet wide on north side of the Land as shown on the recorded plats in Plat Book 24, page 3, and Plat Book 24, page 13, in the aforesaid Clerk's Office, as shown on survey dated September 2, 1988, by Roger Ladenburger, Registered Land Surveyor.

(c) Sanitary sewer easement and utility easement each being 12 feet wide on north side of the Land as shown on the recorded plat in Plat Book 24, page 3, in the aforesaid Clerk's Office, as shown on survey dated September 2, 1988, by Roger Ladenburger, Registered Land Surveyor.

(d) Building limit of 30 feet from the property line on the west and south sides of the Land as shown on the recorded plats in Plat Book 24, page 3, and in Plat Book 24, page 13; in the aforesaid Clerk's Office, as shown on survey dated September 2, 1988, by Roger Ladenburger, Registered Land Surveyor.

(e) Screening easement 10 feet wide on the east side of the land as shown on the recorded plat in Plat Book 24, page 13, in the aforesaid Clerk's Office, as shown on survey dated September 2, 1988, by Roger Ladenburger, Registered Land Surveyor.

(f) Encroachment upon the southern part of the Land by chain link fence appurtenant to the Land, as shown on survey dated September 2, 1988, by Roger Ladenburger, Registered Land Surveyor.

(g) Mortgage in favor of Home Federal Savings of Kansas City, F.A. recorded in Mortgage Record Book 1512 page 505.

APPENDIX I

MANAGEMENT CONTRACT

THIS CONTRACT is made and entered into this 1st day of September, 1989, by and between ROBERT E. PETRIE (hereinafter the "First Party"), a sole proprietor whose principal place of business is Bowling Green, Kentucky, and RES-CARE HEALTH SERVICES, INC. (hereinafter the "Second Party"), a Kentucky corporation with headquarters in Louisville, Kentucky.

WHEREAS, the First Party, Robert E. Petrie, has a license to operate an Intermediate Care Facility for the Mentally Retarded (ICF/MR), at a site located on Trent Boulevard in Lexington, Kentucky (hereinafter the "Facility"), can obtain certification with the. Kentucky Medicaid Assistance programs as a provider 0f ICF/MR services at that location and desires to employ a firm with substantial interstate experience in operating ICF/MR facilities, to manage the operation of the Facility as a duly licensed and certified ICF/MR program; and

WHEREAS, the Second Party, Res-Care Health Services, Inc., successfully operates ICF/MR programs in five states (including Kentucky), and desires to manage the Facility for its owners;

NOW, THEREFORE, it is mutually agreed by and between the parties hereto, in consideration of the mutual covenants contained herein, that the Second Party will provide the management services described in this document under the terms and conditions hereinafter set out.

SECTION I - AUTONOMY OF THE FIRST PARTY

Nothing in the Agreement shall be deemed in any way to alter or impinge upon First Party as a separate and autonomous entity. The First Party is the official Provider of Record at the Facility and holds the Facility's license.

The First Party shall at all times exercise control over the assets and operation of the Facility. The Second Party shall perform its duties as an independent contractor. Nothing in this document may be construed to assign control of the Facility's assets, or the operation of the Facility to the Second Party except as may be specifically indicated.

SECTION II - SECOND PARTY SERVICES

The Second Party will perform the following services necessary to the operation of the Facility in an efficient manner:

a. Manage and operate the Facility so as to provide the highest possible level of care to its residents consistent with the principle of normalization, state licensure regulations, certification standards and available reimbursement from the Kentucky Medical Assistance Program.

b. Provide appropriate and humane care and treatment of all residents, protecting their rights per applicable State and Federal law, including those pertaining to safeguarding and accounting for their personal funds.

c. Maintain and operate the Facility in compliance with Federal regulations (currently 42 CFR 442.250 and 42 CFR 442.254 and 42 CFR 442.400 to 42 CFR 442.516) as they pertain to the Facility's participation in the Title XIX program.

d. Maintain and operate the Facility in compliance with the standards for State licensure (currently 902 KAR 20:056 and 902 KAR 20:085) sufficient to maintain a license as an ICF/MR facility.

e. Provide consultation to the First Party with regard to new construction or renovation of the current Facility in order to better comply with Federal and State licensure/certification standards and/or to improve the operation of the Facility.

f. Develop any documents and plans as may be required for any new construction or renovation that may occur, including such documents as may be required for the Certificate of Need process, if applicable.

g. Maintain the Facility, its premises and any off-campus property associated with the Facility's operation in a good and satisfactory condition, in keeping with the First Party's lease for the Facility with Angell Real Estate Company.

h. Not do or permit to be done any act or thing which will invalidate the Facility's insurance, is incompatible with its operation as an ICF/MR facility, or which would violate the First Party's lease for the Facility with Angell Real Estate Company.

I. Hire and terminate staff. Said staff are to be employees of the Second Party subject to its personnel rules and eligible for its benefits package. The Second Party is responsible for worker's compensation insurance, unemployment insurance and payroll taxes for its work force. Any worker's compensation or unemployment claims of its employees are the Second Party's responsibility (subject to applicable State and Federal law) not that of the First Party. The Second Party may choose to use service contracts with individuals rather than regular employment. Any such contracts are subject to applicable State and Federal law and regulation. The First Party does not participate in any such agreements.

j. Provide complete financial management services for the Facility (except as noted in Section IV). Those services include:

- collection of all available sources of revenue to the maximum extent possible.

- deposit of all funds received from the operation of the Facility in a bank account or accounts bearing the name of the Facility in a bank or trust company approved by both parties.

- control the account or accounts described above for the purposes of operating the Facility, performing its obligations hereunder and. paying fees to the Second Party until the expiration or termination of this Contract.

- payment of the First Party's lease expenses with Angell Real Estate Company.

- payment of all other operational expenses.

- arrangement of a line-of-credit for any short term financing that may be required.

- on a monthly basis, transfer from the bank account(s) described above to an account designated by the First Party those funds determined to be due the First Party pursuant to Section V (entitled "Second Party compensation, First Party's Retention of Revenue")

- preparation of cost reports required by the Kentucky Medical Assistance Program for ICF/MR providers.

- preparation of an inventory of property and equipment present at the Facility on September I, 1989, and a similar inventory at the end of the Contract period.

- representation for the First Party in any appeal of rate adjustments imposed by the Kentucky Medical Assistance Program.

- representation for the First Party in any dispute it may have with Angell Real Estate Company, its Lessor for the Facility.

- compliance with the terms and conditions of the Lease Agreement between Angell Real Estate Company and First Party, including, but not limited to, the timely payment of all rents due under said lease.

k. Contract for services with vendors as necessary for the operation of the Facility.

l. Purchase supplies needed for the operation of the Facility.

m. Purchase necessary equipment for the Facility out of Second Party's funds, retaining that portion of the reimbursement that reflects its depreciation and interest expenses associated with such purchases (see Section V hereof). Commonly accepted accounting principles are to be used in establishing depreciation schedules. Any amounts not fully depreciated at any time when this Contract is canceled or terminated by either party will be paid in full by the First Party to the Second Party within 30 calendar days of such cancellation or termination.

n. Lease vehicles and equipment for the Facility, using its own credit to arrange any such leases. The choice of purchasing or leasing any vehicle or piece of equipment remains the sole responsibility of the Second Party.

o. Develop an Annual Report for the First Party reviewing the Second Party's activities in performing the services agreed upon in this Contract.

p. Replace the inventory present on September 1, 1989, at the end of the Contract period, or reimburse the First Party for the value of such inventory as proportionately adjusted to reflect any change in the Consumer Price Index over the term of this Contract.

q. Pay the First Party the undepreciated balance on any Facility equipment identified in the September 1, 1989 inventory which is not accounted for at the end of the Contract term, or fulfill any responsibilities the First Party may have to Angell Real Estate Company with respect to any such equipment.

r. In order to safeguard the interests of the First Party, Angell Real Estate Company, and/or the Second Party's clients, employees and invitees, the Second Party will obtain, assume or establish applicable insurance for the Facility effective as of the date of this Contract. The coverages shall comply with those requirements that appear in the First Party's lease of the Facility with Angell Real Estate Company.

SECTION III - GOALS FOR THE SECOND PARTY

It is the expressed goal of the Second Party to maintain ICF/MR certification for the Facility on an ongoing basis.

The Second Party will seek to maintain appropriate and adequate relationships with referral sources sufficient to maintain 99% occupancy.

The Second Party will play an active role in promoting goodwill for the Facility by participating in community events in Lexington, Kentucky, and in the Kentucky and National Associations of Private Residential Resources.

SECTION IV - RESPONSIBILITIES OF THE FIRST PARTY

In the event that leasehold improvements are made to the Facility, the First Party is responsible for arranging financing for the plans, remodeling or new construction when the cost thereof exceeds $5,000. Payment for any such activity shall come from the First Party's retained income (see Section V hereof). Any decision to remodel or add new construction to the Facility shall be at the sole discretion of the First Party.

SECTION V - SECOND PARTY COMPENSATION, FIRST PARTY'S RETENTION OF REVENUE

As compensation for its management services, the Second Party shall charge the First Party 15% of all other expenses associated with the Facility, as part of the Facility's total expenses. Pursuant to Section II, paragraphs (l) and (m), the Second Party shall also retain that portion of the revenue that reflects. depreciation and interest expenses associated with any necessary capital purchases made by the Second Party for the operation of the Facility. Monthly payment of the management fee shall be made on the 25th day of each succeeding month, beginning with a payment to be made on October 25, 1989 for the month of September, 1989.

Should the Facility's cash flow be insufficient to pay the management fee in total, the Facility shall accrue the unpaid portion as a charge to the Facility which shall bear an annual interest rate equivalent to the concurrent prime rate of

Citizens Fidelity Bank in Louisville, Kentucky, adjusted at the first of each month, plus 2%. Payment of the management fee is subordinate to lease payments to the Angell Real Estate Company, all other operating expenses and the minimum monthly transfer to the First Party described below. Any accrued management fees that remain uncollected at the end of the Contract period shall be forfeited.

Beginning on October 25, 1989, the Second Party shall transfer monthly an amount equal to the prior month's net operating income to an account designated by the First Party. For this purpose, net operating income is defined as the Facility's gross revenues minus the lease payment to Angell Real Estate Company, minus the Facility's regular operating expenses and minus the management fee owed to the Second Party, using theaccrual method of accounting, under generally accepted accounting principles. The minimum transfer shall be $1,500 per month.

Any reimbursement to State and/or Federal government required by the Kentucky Medical Assistance Program as a result of audit exceptions to the operation of the Facility by the Second Party shall be the responsibility of the Second Party. Any other such reimbursement required by the Kentucky Medical Assistance Program shall be the responsibility of the First Party.

Any liquidated damages owed by the First Party to Angell Real Estate Company as a result of Second Party's failure either to make lease payments on behalf of the First Party or to meet other terms of this Contract regarding the First Party's lease for the Facility shall be paid by the Second Party.

SECTION VI - LENGTH OF CONTRACT, AMENDMENT CANCELLATION RIGHT OF FIRST REFUSAL

This Contract shall be effective beginning on the lst day of September, 1989, and shall expire on the 31st day of August, 1999.

This Contract may be amended or modified by written agreement of both parties (subject to the prior written consent of Angell Real Estate Company), signed by properly authorized representatives with the power to bind their respective organizations.

SECTION VII - DISCRIMINATION PROHIBITED

During the performance of this Contract, the Second Party shall not discriminate against any employee or applicant for employment because of race, religion, color, creed, national origin, sex, handicap, military status or age, in keeping with all applicable State and Federal statutes and regulations.

SECTION VIII - TERMS AND CONDITIONS

This Contract shall be governed by the laws of the Commonwealth of Kentucky. All of the terms and conditions between the two parties are expressed herein. No other conditions expressed or implied outside of this document are binding on either party.

Further, this Contract shall be binding on, and inure to the benefit of, the parties and their respective heirs, successors and assigns. By their signatures below, the representatives of both parties affirm their authority to bind their respective organizations to the terms and conditions of this Contract.

SECTION IX - GUARANTY

The parent, company of Second Party, Res-Care Development Company, Inc., hereby guarantees every obligation of Second Party under this Contract.

Signed by the First Party

ROBERT E. PETRIE
By /s/Robert E. Petrie
by Doro P. Lawson, P.
Date 7-28-89
Witness /s/Kathryn P. Bond

Signed by the Second Party

RES-CARE HEALTH SERVICES, INC
By /s/Terry R Browns-
Date 8-2-89
Witness /s/N.C Recht-

Signed by the Second Party's Parent Company for the Purpose of Guaranteeing Second Party's Obligations

RES-CARE DEVELOPMENT COMPANY, INC.
By /s/James R -------
Date 8-2-87
Witness /s/Doris Garr

Supreme Court, U.S.
FILED
MAY 21 2007
OFFICE OF THE CLERK

No. 06-1423

In the Supreme Court of the United States

RES-CARE, INCORPORATED, SUCCESSOR BY MERGER TO RES-CARE HEALTH SERVICES, INCORPORATED, AND COMMUNITY ALTERNATIVES INDIANA, INCORPORATED,
Petitioners,

v.

OMEGA HEALTHCARE INVESTORS, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT
(Rule 29.6)

Respondent Omega Healthcare Investors, Inc., has no parent corporation, and no publicly-held company owns ten percent (10%) or more of its stock.

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BRIEF IN OPPOSITION

I. Question Presented

Res-Care's statement of the question presented mischaracterizes both Omega's Complaint and the Seventh Circuit Court of Appeals' decision, and misreports significant holdings of the Supreme Court decision upon which its Petition for Writ of Certiorari is purportedly based. Accurately restated, the question posed by this Writ is:

> "Should the ADA be reinterpreted, seventeen years after it was enacted, retroactive to 1999, to excuse from liability a single, private lessee-operator of a private, Kentucky ICFMR, who closed and decertified the leased facility in violation of its Lease."

II. Statement of the Case Corrections and Additions

Res-Care has mischaracterized certain essential facts and issues, and omitted others, in its Statement of the Case. The following corrections and additions are relevant to this Court's consideration of whether the ADA should be reinterpreted.

A. Both the ADA and *Olmstead* were irrelevant to Res-Care's contract breach.

Res-Care seeks to wrap itself in the flag and proclaim that its actions in breaking its contractual obligations were reluctantly compelled by its desire to comply with the provisions of the ADA and the "integration mandate" discussed and defined in *Olmstead*. However, the ADA was enacted in 1990. The *Olmstead* decision was not decided

until June of 1999. It was mid-1998 when Res-Care began taking steps to close and decertify Omega's facility. (Res-Care's Petition, page 6.)

If the ADA mandated such action when it was enacted, why did it take Res-Care eight years to notice? At the time that Res-Care closed and decertified Omega's facility, Res-Care was the country's largest provider of institutionalized ICFMR services. The same year that Res-Care breached its contract by terminating Omega's facility's Medicaid certifications, under the claim that it was mandated to do so by the ADA, Res-Care purchased three additional ICFMR facilities, which it continued to run as large ICFMRs for many years. Res-Care is asking this Court for a reinterpretation of the ADA that can somehow be limited to one facility Res-Care leased, but not the other facilities that Res-Care owned.

Res-Care's claim that it was acting under the compulsion of the *Olmstead* decision is equally untrue. *Olmstead* was not decided until June of 1999, almost a year after Res-Care began taking steps to breach its contract with Omega. Res-Care's chairman, Ron Geary, was candid in his deposition about Res-Care's actual motivations. Res-Care took this action after a cost benefit analysis concluding that the virtually-unregulated (at the time) community care system would be more profitable to Res-Care than the heavily-regulated ICFMR facilities. Geary described the federal funding as a "pot of money," a larger percentage of which would be Res-Care's if the Omega facility was decertified and closed, and the Medicaid funding transferred to Res-Care's anticipated conversion waiver service contracts.

B. The contract Res-Care breached did not restrict individual resident rights.

First in the District Court, then in the Court of Appeals, and now in the Supreme Court, Res-Care has continued to repeat the same inaccurate slander. Res-Care falsely alleges that Omega is claiming that the residents of its facility are "operating assets" whose movement is at issue. Omega has never made such a claim. It is only Res-Care who has acted to deprive facility residents of their freedom of choice mandated by *Olmstead*. The "operating asset" of Omega that has always been at issue is the Medicaid certification of the facility as an ICFMR. It is the contractual protections of that certification which were breached by Res-Care.

Omega has never objected to any individual moving from its facility to different accommodations. Residents rarely, but periodically, chose to move to either community care, another private ICFMR, a state-owned or Res-Care-owned ICFMR, or the private care of friends or relatives. The Omega facility historically maintained 99% occupancy, without any restrictions on resident movement, because it was a well-run and pleasant facility. There had always been a long waiting list of eligible and unserved individuals waiting to enter the facility, to replace individuals who preferred to receive care in a different setting. Contrary to Res-Care's misrepresentation, Omega sought only to protect its certifications, and to enforce Res-Care's lease obligation to fill occupancy openings resulting from individuals leaving the facility with one of the thousands of qualified but unserved individuals on the waiting list for receipt of such services.

Early in the lawsuit, an Agreed Order was entered to temporarily prohibit Res-Care from evicting the residents of Omega's facility, until the Court could determine whether

Res-Care had the right to empty, close, and decertify Omega's facility, in violation of its lease obligations. A second Agreed Order was later entered which reaffirmed that Omega had no objection to any individual wishing to leave the facility doing so. The same Agreed Order ordered that Res-Care do nothing during its extended period of possession to cause the decertification of the facility, or to prevent Omega's next lessee-operator from replacing any individuals who chose to depart. See Res-Care's Petition Appendix, pages 74(a) and 75(a), paragraphs 4 and 6. Res-Care closed and decertified Omega's facility during the holdover period in direct contempt of the District Court's Agreed Order. Res-Care's conduct became not only a breach of its contract with Omega, but also a fraud upon the Federal District Court.

By the time Summary Judgment briefs were filed in the District Court, Res-Care's persistent misrepresentations of Omega's allegations were already an issue. No matter how many times Omega advised Res-Care and the District Court that Omega was not claiming that individual residents did not have the right to move out of the facility whenever they chose to do so, Res-Care continued to demand to litigate what it wished had been Omega's allegations, instead of the actual allegations which it could not defend. In its Brief to the District Court in opposition to Res-Care's Motion for Summary Judgment, Omega found it necessary to state the following:

> "B. Res-Care's 'Straw Man' Claim that this litigation has anything to do with preventing people with disabilities from moving into the community should be rejected, again.

> It is tiresome to have to continue to repeatedly respond to defendant's same, persistent misrepresentation of the allegations of Omega's Complaint. Once again, Res-Care files a brief in which they pretend that they still don't understand that Omega has never claimed that any provision of the leases between Res-Care and Omega prohibits individual residents from moving out of the facilities, for any reason. Omega has never claimed that Res-Care is liable for breach of contract or conversion or on any other theory because individual residents, from time to time, elect to move out of Res-Care managed facilities. After three Complaints and multiple briefs on the subject, it can no longer even be pretended by Res-Care that their persistent misrepresentation of Omega's legal and factual positions is an honest inability to understand or comprehend what this lawsuit is actually about."

(Rec. Doc. 182, page 20.)

Here, in the Supreme Court, Res-Care is still repeating the same falsehoods about Omega's allegations.

C. The residents of the facility did not ask to be relocated; they were forced by Res-Care to leave.

Res-Care characterizes its actions as a response to resident demands to be moved to community-based programs, but the record shows the opposite. There was a high level of satisfaction with the services being provided to the residents in the facility until Res-Care notified those residents that the facility would be closing, and that they would have no choice but to relocate. The District Court made Findings of Fact confirming that Res-Care told the residents that they had to

relocate, rather than receiving requests from residents to do so. See Res-Care's Petition Appendix, page 39(a), Findings of Fact 14 and 15.

D. The State of Kentucky did not support Res-Care's "public policy" claims.

By attaching Amicus Briefs filed in the District Court, Res-Care attempts to put a non-existent stamp of State support upon its actions. In fact, the Amicus Brief filed by Protection and Advocacy, a Division within the Department of Public Advocacy in Kentucky State Government ("P&A"), was brought on behalf of three individuals (out of the 180 at the facility) who had located alternative accommodations and desired to move. The move of those three residents was temporarily delayed by the first Agreed Order in which Res-Care agreed not to transfer residents out of the facility until such time as the Court could hold a hearing to determine the parties' respective contractual rights as to the continuing operation of the facility. At that hearing, no one opposed the move of those three individuals. The second Agreed Order, entered at the hearing, expressly preserved the right of any individuals to leave the facility if they chose to do so.

The Kentucky Cabinet for Health Services submitted an Amicus Brief supporting the closing of the facility, but not based on any generally-applicable public policy. They claimed that the secret negotiations between Res-Care and the State had gone so far toward a conclusion, that it would be unfair to interrupt the process at that point. In the same brief, however, the Health Cabinet argued against the existence of a public policy generally requiring the closing of ICFMR facilities, because of the state-owned and state-sanctioned facilities which continued to be operated.

The Kentucky Health Cabinet did not even claim that Res-Care should be relieved from its contractual obligations to Omega, or relieved of the obligation to pay damages, in the event that Res-Care's agreement with the State to close and decertify the facility was a breach of its contractual obligations to Omega.

> "The cabinet is not a party to this litigation and expresses no opinion concerning the outcome of the monetary claims between the parties."

Appendix, page 60(a) - 61(a).

E. There was no shortage of demand for ICFMR services.

In its brief, Res-Care refers to ICFMRs as having no significant demand, and likens them to "buggy whip" manufacturers, in an effort to suggest that Res-Care's de-certification of one such facility in breach of its contract should be forgiven. The argument is simply false. Until Res-Care closed the facility and advised the residents that they would have no choice except to move out of the facility, it was 100% occupied. There were waiting lists for space in such facilities at the time Omega was closed, and those waiting lists remain to this day. Omega acknowledges as much in its Petition when it accurately notes that the breach of contractual duties by Res-Care creates liability on the part of Res-Care for "millions of dollars in damages." Petition, page 3.

F. Additional facts omitted from Res-Care's Statement of the Case.

Res-Care prepared a proposal for the State of Kentucky under which Res-Care offered to permanently close Omega's facility in exchange for the State of Kentucky's agreement to use the money saved by the State to fund an additional 180 "waiver" slots. (R. 185, page 10; R. 186, Kelley deposition, pages 80-82.) Res-Care approached the State about closing the Omega facility. (R. 185, page 10; R. 186, Morse deposition, page 7; Geary deposition, page 73.) The State of Kentucky never threatened to close the Omega facility independent of Res-Care's offer to voluntarily do so. (R. 185, page 10; page 186, Cross deposition, page 111.) The State of Kentucky has never attempted to force any legally-operating private ICFMR to close for the purpose of seeking to "downsize" or to convert its ICFMR funding into "waiver slots," nor did the State have any future plans to do so. (R. 185, page 10; R. 186, Boyd deposition, pages 19-20.)

The State of Kentucky made it clear to Res-Care that the only way Res-Care could acquire additional conversion waiver slot funding would be if Omega's facility was decertified and closed. (R. 185, page 10; R. 186, Kelley deposition, page 149.) Res-Care knew that the closing and decertification of Omega's facility had to be permanent, in order to obtain additional State funding for Res-Care's community-based services. (R. 185, page 11; R. 186, Waskey deposition, pages 76-77; Geary deposition, pages 118-119.) Res-Care knew that Kentucky would only be willing to fund the new waiver slots if Omega's facility was permanently closed and decertified. (R. 185, page 11; R. 186, Geary deposition, pages 118-119.) Res-Care promised Kentucky officials that they would cause the permanent decertification of Omega's facility in exchange for additional

waiver slot funding. (R. 185, page 11; R. 186, Morse deposition, pages 7-8.) Res-Care told State officials that it had the ability to permanently close Omega's facility, and acknowledged that Res-Care understood that this was an important condition of their additional funding request. (R. 185, page 11; R. 186, Boyd deposition, pages 9-10.)

Res-Care's General Counsel, David Waskey, and the counsel for the Kentucky Cabinet of Health and Human Services, Ellen Hessen, met to discuss how the operation of Omega's facility could be permanently terminated. (R. 185, page 11; R. 186, Kelley deposition, pages 147-148.)

None of the residents of the facility were given a choice by Res-Care to remain. The residents had no choice about whether or not the facility would remain open, or whether they would be required to move. (R. 185, page 11; R. 186, Boyd deposition, pages 18, 25, 33-34.)

III. Reasons for Denying the Writ

A. Res-Care admits that no generally-applicable "public policy" exists.

Res-Care admits in its Petition that the closure of Omega's facility in violation of Omega's contract could not be justified on the grounds of any generally-applicable public policy, as expressed in the ADA as interpreted in 1999 by *Olmstead*:

> "Res-Care has not argued that the integration mandate requires the closure of all institutions or that continued operation of institutions would be 'illegal'."

Petition, page 5.

The State of Kentucky agreed that *Olmstead* established no "public policy" requiring ICFMRs to be closed and decertified. In its Amicus Brief in the trial court, the State of Kentucky expressly rejected Res-Care's argument that the ADA or *Olmstead* required the closing and relocation of the 1,200 residents of Kentucky's state-run and state-licensed ICFMR programs:

> "There is no doubt that it would place an unreasonable financial burden on Kentucky, and indeed would fundamentally alter this state's Medicaid program, if it were compelled to provide community-based residential services to all of the approximately 1,200 people with mental retardation or developmental disabilities in state licensed long term care facilities."

Appendix, page 68(a).

After admitting that neither the ADA nor *Olmstead* established a "public policy" requiring the closure of ICFMRs, in general, it is difficult to understand Res-Care's argument to this Court for how it could be possible that the ADA and *Olmstead* excused Res-Care's closing and decertification of Omega's ICFMR, in breach of its Lease.

This is not the 17th Century. Res-Care is not a "privateer," with "letters of marque" to privately plunder the business operations of competitors, to do privately what the State could not do directly. The economic chaos that would be imposed by allowing such an ephemeral "public policy" argument to excuse some private contract violations, but not others, can scarcely be overstated. Once Res-Care admitted, as it did, that no public policy generally requires facilities such as Omega's to be closed and decertified, it cannot rationally argue that this non-existent public policy

nevertheless justifies the impairment of Omega's contract rights, in order to excuse what otherwise is Res-Care's actionable breach of contract.

B. This case only affects the litigants in a simple breach of contract case.

For Res-Care's breach to be excused on the basis of "public policy," a public policy must be found that is applicable to more than one private Kentucky ICFMR. If it has no broader application, there is no need for a Supreme Court pronouncement about it. By denying that any public policy exists applicable to any other ICFMRs and leases (Res-Care Petition, page 5),
Res-Care destroys any reason for this Court to grant certiorari.

C. Res-Care admits that the real reason it breached the Lease was to fund its own alternative business plan.

Res-Care states succinctly on page 6 of its Petition:

> "But the Health Care Financing Administration (now Centers for Medicare and Medicaid Services) required Res-Care to close its ICFMR operations before Medicaid would provide funding for Res-Care's clients in the community. So Res-Care closed its institutional operations at Excepticon, withdrew from the Medicaid program for the Excepticon ICFMR, and left Omega with what was previously leased to Res-Care - a building. However, because the building could not be used as an ICFMR, Omega could not lease it to a new operator."

Petition, Page 6.

Res-Care bartered a right which it did not have under its contract with Omega, for no better reason than to further the Res-Care business plan.

For all of Res-Care's effort to pose as a champion of public interest, its decisions and actions were motivated only by money. Res-Care's president acknowledged that Res-Care is a for-profit public corporation in which "every decision we make is based upon a cost benefit analysis." (Rec. Doc. 182, page 25 citing Geary Deposition, page 69, lines 9-10.) Both Indiana and Kentucky Omega facilities were closed and decertified by Res-Care because Mr. Geary saw an opportunity to divert money away from Omega's ICFMR facilities and into an expansion of Res-Care's "waiver" business. (Rec. Doc. 182, page 21, citing Geary Deposition, page 80, lines 5-13). Res-Care held internal discussions about increasing its Medicaid waiver service business by leasing Medicaid-certified ICFMR facilities, and decertifying those facilities, in exchange for additional waiver slots that would be serviced by Res-Care. (Rec. Doc. 180, page 13, citing Cross Deposition, page 90, lines 18-24; page 91, lines 1-24; page 92, lines 1-22.)

Res-Care knew that it would need increased Medicaid funding to make its expansion of its waiver business practical (Rec. Doc. 180, page 13, citing Cross Deposition, page 82, lines 14-24; page 83, lines 1-23.) These waiver slots would be funded by the savings generated to the states from the decertification of the ICFMRs that Res-Care was leasing from Omega. (Rec. Doc. 180, page 13 citing Cross Deposition, page 91, lines 1-24, page 92, lines 1-22.) Res-Care knew that the leased Omega facilities would need to be closed permanently, in order to accomplish Res-Care's goal. (Rec.

Doc. 180, page 13, citing Geary Deposition, page 33, lines 10-19.) Ron Geary, Res-Care's President, Chairman, and CEO, described this process as moving "a pot of money" from Omega's ICFMR facilities to waiver slots that would be serviced by Res-Care (Rec. Doc. 180, page 14, citing Geary Deposition, page 79, line 1; page 80, lines 1-13.)

Res-Care admits that closing Omega's facility was incompatible with the continued operation of the facility as an ICFMR after the expiration of Res-Care's Lease term. (R. 185, page 12; R. 186; Waskey Deposition, page 72.) The financial windfall to Res-Care was enormous, because the only "price" that it was paying for a multi-million dollar increase in the funding available for Res-Care's community service business was the decertification of a facility it did not own and had no right to decertify.

D. The legal standard for establishing a "public policy" defense was not met.

The test in Kentucky for determining when a contract may be declared unenforceable as against public policy is the determination that the contract "has a direct tendency to, and would if upheld and enforced, injuriously affect a material and substantial part of the public." *Forbes v. City of Ashland*, 246 Ky. 669, 55 S.W.2d 917, 919 (1932). Kentucky courts do not favor altering agreements on public policy grounds, and the Supreme Court of Kentucky has admonished that "the courts should use extreme caution in declaring a transaction to be void on the ground that it is against public policy." *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 221 S.W.2d 435, 439 (1949). In Kentucky, public policy violations are an issue of law for the court. *Firestone Textile Company Division v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983).

In determining whether a contract violates public policy, the United States Supreme Court has emphasized that a court must give due deference to the party's freedom of contract.

> "It is a matter of great public concern that freedom of contract not be lightly interfered with."

Steele v. Drummond, 275 U.S. 199, 48 S.Ct. 53, 54 (1927).

The illegality principle "must be cautiously applied to guard against confusion and injustice." *Id.* at 54. "It is only in clear cases that contracts will be held void." *Id.*

> "The principal that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests."

Twin City Pipeline Company v. Harding Glass Company, 283 U.S. 353, 51 S.Ct. 476, 477 (1930).

Courts must be careful not to permit a party to avoid its liability under contract by hiding behind an unwarranted public policy defense.

> "The usual and most important function of courts . . . is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy."

Baltimore & Ohio Southwest Railway Company v. Voight, 176 U.S. 498, 20 S.Ct. 385, 387 (1899).

Res-Care's "public policy" defense fails to meet these legal standards.

E. *Olmstead* expressly rejected Res-Care's position a few months before the breach.

The *Olmstead* decision in June of 1999 did not support Res-Care; it repudiated Res-Care's position. The Court clearly faced the question of whether ICFMRs were to be forced to close, as a matter of public policy, in order to accomplish the integration of residents into smaller community-based homes. The U.S. Supreme Court expressly declared that no such public policy existed and the ADA could not be read to require such closing. *Olmstead v. LC*, 527 U.S. 581, 144 L.Ed2d 540, 119 S.Ct. 2176 (1999).

In *Olmstead*, the Supreme Court found that two women, one diagnosed with schizophrenia and the other with a personality disorder, who were confined for treatment in the psychiatric unit of Georgia Regional Hospital in Atlanta, were being discriminated against. The women's treating professionals had concluded that each of the women could be cared for appropriately in a community-based program, but the State of Georgia had refused to permit such placement for them. The holding of the Supreme Court, written by Justice Ginsburg, is as follows:

> "Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than institutions. The answer, we hold, is a qualified yes. Such action is in order when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account

> the resources available to the state and the needs of others with mental disabilities."

Page 587.

The Court specifically stated that its decision was not Constitutionally based, but was exclusively based upon its interpretation of the provisions of the ADA. *Id.* at 588. The Supreme Court in *Olmstead* specifically rejected the argument that ICFMR facilities would need to be closed in order to comply with the ADA, or the *Olmstead* decision:

> "We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."

Pages 601-602.

> "Nor is there any federal requirement that community-based treatment be imposed on patients who did not desire it."

Page 602, paragraph 13

> "As already observed, see supra, at 17, the ADA is not reasonably read to compel states to phase out institutions, . . ."

Page 604.

> "For other individuals, no placement outside the institution may ever be appropriate." See Brief for American Psychiatric Association, *et al. as amici* curiae, 22-23 ("some individuals, whether mentally

> retarded or mentally ill, are not prepared at particular times - perhaps in the short run, perhaps in the long run - for the risks and exposure of the less protective environment of community settings;" for these persons, "institutional settings are needed and must remain available."); Brief for Voice of the Retarded, *et al., as amici curiae*, 11 ("each disabled person is entitled to treatment in the most integrated setting possible for that person - recognizing that, on a case-by-case basis, that setting may be in an institution."); . . .

Page 605.

Each of the opinions written in *Olmstead* concurred on one principle. They all agreed that neither their decision, nor the ADA, required the closing of existing facilities. Justice Kennedy, joined by Justice Breyer, wrote in their concurring opinion:

> "It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that states had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision."

Pages 609-610.

> "The State is entitled to a wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs."

Page 610.

The *Olmstead* decision suggests that, if there was any violation of public policy in this case, it was by Res-Care. *Olmstead* requires residents to be given a choice of accommodations. Res-Care gave no such choice to the residents of Omega's facility. Res-Care admitted it closed the facility and left all of the residents with no alternative but to relocate. *Olmstead* requires that a continuum of care options be provided by each state, and recognizes that there is a need for facilities like Omega's to serve those residents in need of more intensive care, treatment, and security. Res-Care's decertification of Omega's facility removed it as a continuum of care option.

F. The Commonwealth of Kentucky, and Res-Care itself, rejected Res-Care's public policy claim by their actions.

The Commonwealth of Kentucky rejected Res-Care's "public policy" premise, as did Res-Care itself. The Commonwealth of Kentucky rejects the premise by continuing to operate its own large ICFMRs in Kentucky, and by continuing to permit the operation of private ICFMRs in the State. Res-Care was, at the time that it closed Omega's facility, the country's largest provider of large ICFMR care. At the same time that Res-Care claims that a "public policy" required it to decertify Omega's facility, Res-Care was purchasing and operating nearby large ICFMRs for profit. Even though the ADA was enacted in 1990, Res-Care saw no "public policy" requirement to empty and decertify any of its leased ICFMRs, including Omega's, until after a decade of profitable operation, and multiple Lease extensions, when Res-Care's lease was about to expire.

Res-Care's chairman, president, and CEO, in a suit brought by Res-Care against the State of Indiana, in sworn testimony provided in an effort to increase the reimbursement rate paid by the State of Indiana to Res-Care for the operation of Indiana ICFMRs, testified that:

> "The individuals we serve are extremely dependent upon an extensive range of specialized services, which are not available in settings other than ICFMRs."

Rec. Doc. 182, page 5.

Res-Care's actions, like its CEO's testimony, reject the claim that "public policy" demands decertification of ICFMRs:

> "Res-Care admits that the continuing operation of such facilities is perfectly legal (Winters Depo., page 105, lines 20-24), and in fact, Res-Care is the nation's largest provider of ICFMR services. During the same time period in which Res-Care wrongfully closed the Omega-owned facilities, Res-Care purchased three Indiana ICFMRs which had continued to operate, and such facilities continue to be operated by the State of Kentucky and the State of Indiana today (Winters Depo., page 26, line 25; page 27, line 6)."

Rec. Doc. 182, page 3.

The State of Kentucky never threatened to close Omega's facility, before Res-Care's offer to voluntarily do so. (R. 185, page 10; R. 186; Cross-Depo., page 11.) The State of Kentucky has never attempted to force any legally operating private ICFMR to close for the purpose of seeking to "downsize" or to convert its ICFMR funding into "waiver

slots," nor did the State have any future plans to do so. (R. 185, page 10; R. 186, Boyd Depo., pages 19-20.)

The Kentucky Supreme Court has consistently held that public policy is to be determined by the legislature, and that courts overstep their bounds when they intrude upon that legislative prerogative. ". . .We adhere to the principle that the establishment of public policy is the prerogative of the general assembly." *Reda Pump Company, A Division of TRW, Inc. v. Finck*, 713 S.W.2d 818, 821 (Ky. 1996). "It is elementary that the legislative branch of government has the prerogative of declaring public policy and that the mere wisdom of its choice in that respect is not subject to the judgment of the court." *Fann v. McGuffey*, 534 S.W.2d 770, 779 (Ky. 1975).

There can be no valid "public policy" defense to Res-Care's breach, where the U.S. Supreme Court, the Kentucky Supreme Court, public officials of the State of Kentucky in charge of the programs, and Res-Care itself, including its CEO, have all expressly rejected, by word and by deed, the "public policy" behind which Res-Care is attempting to hide.

G. Res-Care's breach was about making money, not ADA compliance.

Contrary to Res-Care's hyperbole, Omega's facility was hardly a "buggy-whip factory." The facility was full, until Res-Care emptied and closed it in 1999. The "trend" toward community services was not a disaster for owners of such facilities, as Res-Care asserts. To the contrary, it presented a significant economic opportunity. When Res-Care was preparing to close and decertify Omega's Indiana facilities, a year before the decertification of the Kentucky facility, Res-Care prepared pro formas projecting an increase in its net

profits of up to $70,000 per month, for servicing the 116 residents which decertification would move from Indiana facilities to Res-Care waiver business. (Brief in Support of Plaintiff's Motion for Summary Judgment on Res-Care and CAI's Fourth Affirmative Defense, Rec. Doc. 113, page 8, Exhibit 9I.) The closing of Omega's Kentucky facility would add 180 new captive customers for Res-Care's waiver business, 50% more than the total in Indiana.

Why was it so important to Res-Care to be the operator at the time that Omega's Kentucky facility was decertified, that it refused to leave at the termination of the Lease? Res-Care went to the extreme of obtaining injunctive relief from the District Court permitting it to retain control past the end of the Lease term. That is certainly odd behavior for someone who alleges that it was operating a "buggy-whip factory," when it could have quietly turned over the facility to the successor operator, and left at the end of the Lease.

Res-Care knew that the single most important factor in residents determining where they would want to go to receive community-based services, after leaving the familiar surroundings of the ICFMR, would be where they could still have the same familiar personnel who had been providing them services before they left the facility. Res-Care knew that if another operator took over the facility, and purchased from Omega the right to decertify that facility at the conclusion of its Lease, that successor operator would be likely to retain most or all of the 180 Omega facility residents as community service clients, once decertification occurred.

The ability to gain an overwhelming advantage in obtaining 180 clients for a multi-million dollar community-based waiver service business was extraordinarily valuable. The successor operator to Res-Care would have paid a

considerable premium to obtain that advantage. Res-Care could also have obtained that advantage, by negotiating for the elimination from the Lease of the restrictions against decertification. Res-Care had no interest in purchasing the right to own, close, and decertify Omega's facility. (R. 185, page 12; R. 186, Geary Deposition, pages 110-111.) Res-Care did not want to pay for rights that it thought it could simply take.

This dispute was never about "public policy." It is about whether it would be Res-Care, or one of its competitors, who would acquire the valuable contract right to decertify Omega's ICFMR, and transfer the funding for 180 residents into a community-based waiver service business that it would dominate. Omega would have sold that right to either, but objects to it being taken without its permission, without compensation, and in violation of its contractual rights. This dispute is about whether Res-Care can avoid paying Omega for the acquisition from Omega of a multi-million dollar business advantage. Nothing more. The Seventh Circuit saw this case for what it is and decided it correctly.

In order to reject Res-Care's "public policy" defense, the Court need only take judicial notice of the fact that the federal government continues to provide Medicaid funding for ICFMR facilities throughout the country, the Commonwealth of Kentucky continues to operate such facilities, and Res-Care itself continues to own and run them.

In order to deny the Petition for Writ of Certiorari, the Court need only note that this case is only about whether one private company can take the assets of another private company, in breach of its contract and for its own financial gain, without having to pay for it.

IV. Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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